(6)

Supreme Court, U.S.
FILED
JUL 14 2003
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No. 02-1183

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: FEB. 12, 2003
CERTIORARI GRANTED: APR. 21, 2003

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF COLORADO

No. 01-1503

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL FRANCIS PATANE, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS
10/31/01	[1460007] Criminal case docketed. Preliminary record filed.
	* * * * *
5/9/02	[1509436] Case argued.
	* * * * *
9/17/02	[1545634] Terminated on the Merits after Oral Hearing; Affirmed;
	* * * * *
10/31/02	[1559678] Petition for rehearing en banc [01-1503] filed by United States.
	* * * * *

DATE	PROCEEDINGS
11/25/02	[1566063] Appellee's response filed by Samuel Francis Patane to appellant's petition for rehearing in banc .
	* * * * *
12/9/02	[1569856] Order filed by Judges Ebel, Anderson and Henry denying Petition for rehearing in banc.
12/13/02	[1571310] Appellant's motion filed by Appellant United States to stay execution of the mandate until 3/10/03 pending petition for certiorari.
12/18/02	[1572403] Order filed by Judges Ebel, Anderson, and Henry granting appellant's motion to stay execution of the mandate until 3/10/03 [1571310-1].
	* * * * *

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF COLORADO

No. 01-CR -228-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL FRANCIS PATANE, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
6/8/01	1	COMPLAINT against Samuel Patane signed by Magistrate Judge Boyd N. Boland AUSA Suneeta Hazra
		* * * * *
6/19/01	6	INDICTMENT by USA Counts file against Samuel Franis Patane (1) count (s) 1 (pc)
6/20/01	8	COURTROOM MINUTES OF ARRAIGNMENT/DETENTION before Magistrate Judge O.E. Schlatter; NOT GUILTY plea entered
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/9/01	12	MOTION To Suppress (Evidence by) Samuel Franis Patane
7/17/01	13	RESPONSE by USA motion to Suppress Evidence
		* * * * *
10/3/01	28	COURTROOM MINUTES OF ORAL RULING before Judge Walker D. Miller; ORDER: GRANTING Motion to Suppress Evidence
		* * * * *
10/29/01	32	APPEAL Notice to C/A by USA from the Order suppressing evidence

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Criminal Case No. 01-CR-228

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL PATANE, DEFENDANT

INDICTMENT
18 U.S.C. § 922 (g)(1)

The Grand Jury charges that:

COUNT ONE

On or about June 6, 2001, in the State and District of Colorado, the defendant, SAMUAL FRANCIS PATANE, having previously been convicted in the District (Court) of El Paso County, Colorado, in Case Number 98CR64 of Possession of Scheduled II Controlled Substance, a crime punishable by imprisonment for a term exceeding one year, did unlawfully and knowingly possess, in and affecting interstate commerce, a firearm to wit: a Glock Model 22, 40mm caliber pistol, bearing serial number RE377.

All in violation or Title 18, United States Code, Section 922(g)(1) and 924(a)(2).

A TRUE BILL:

/s/ ILLEGIBLE
FOREPERSON

RICHARD T SPRIGGS
United States Attorney

SUNEETA HAZRA
By: SUNEETA HAZRA
Assistant U.S. Attorney

DATE: May 17, 2001

DEFENDANT:	Samuel Patane
AGE:	
ADDRESS:	Colorado Springs, Colorado
OFFENSE:	Count I: 18 U.S.C. 922(g)(1) Possession of a firearm by a convicted felon.
LOCATION OF OFFENSE:	Denver, Colorado
PENALTY:	Count I: NMT 10 years imprisonment; $250,000 fine, or both; NMT 3 years supervised release, $100.00 Special Assessment Fee
AGENT:	Richard Marianos Assistant U.S. Attorney
AUTHORIZED BY:	Suneeta Hazra Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

X___ five days or less

_____ over five days

THE GOVERNMENT

X____will seek detention in this case

_____ will not seek detention in this case

The Statutory presumption of detention is or is not applicable to this defendant.

OCDETF CASE: ___ Yes X____ No

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO

Criminal Action No. 01-CR-228

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL PATANE, DEFENDANT

REPORTER'S TRANSCRIPT
HEARING ON MOTIONS

Proceedings before the HONORABLE WALKER D. MILLER, Judge, United States District Court for the District of Colorado, commencing at 2:00 p.m., on the 27th day of September, 2001, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

Sunseeta Hazra, Assistant United States Attorney, 1225 17th Street, Suite 700, Denver, Colorado 80202, appearing on behalf of Plaintiff.

Virginia Grady, Federal Public Defender, 1099 18th Street, Suite 300, Denver, Colorado 80202, appearing on behalf of Defendant.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Janet Morrissey, 1929 Stout Street, Room C-109, Denver, Colorado, 80294, (303) 893-2835

[2]

PROCEEDINGS

THE COURT: We are here on Case No. 01-CR-228, United States of America versus Samuel Patane, I guess is it. Is that the right pronunciation?

MS. GRADY: It looks like it would be, but actuallyit's pronounced Patane.

THE COURT: Patane?

MS. GRADY: Patane, correct. I am sure I will mispronounce it for the entire hearing, but it's correctly pronounced Patane.

THE COURT: Counsel, enter your appearance.

MR. HAZRA: Sunseeta Hazra for the United States. With me is Richard Marianos from the ATF.

MS. GRADY: Virginia Grady along with Mr. Patane.

THE COURT: We are here for hearing on the defendant's motion. Does either side wish sequestration of witnesses?

MS. GRADY: We do, Your Honor, and we are requesting sequestration of witnesses.

MR. HAZRA: No opposition.

THE COURT: All right. Who are these people in the courtroom? Need they be sequestered?

MR. HAZRA: None of them are testifying, Your Honor.

THE COURT: Do we have an order out?

THE COURT DEPUTY: Yes, Your Honor. It's on the door.

THE COURT: All right. This concerns evidence that

[3]

the government would sponsor. Is the government prepared to put on testimony in support of this evidence?

MR. HAZRA: Yes, Your Honor.

THE COURT: Please proceed.

MR. HAZRA: First, Your Honor, I think you should know that defense counsel and I stipulated to exhibits that are in front of you. We would call Officer Tracy Fox.

THE COURT: The Exhibits A through J are stipulated?

MS. HAZRA: Yes, Your Honor.

THE COURT: All right. Exhibits A through J are admitted.

(Tracy Lynn Fox was sworn.)

THE WITNESS: I do.

THE COURT DEPUTY: Please state your full name and spell your last name for the record.

THE WITNESS: Full name is Tracy Lynn Fox, F-O-X.

DIRECT EXAMINATION

BY MS. HAZRA:

Q. Good afternoon, Officer Fox. Where are you employed?

A. City of Colorado Springs as a police officer in Colorado Springs.

Q. How long have you been so employed?

A. Approximately a year and a half, a little bit over.

Q. In that capacity did there come a time when you needed to investigate a complaint complaining that Samuel Patane had [4] violated a temporary restraining order?

A. Yes.

Q. How did you first hear about this complaint?

A. I was called, dispatched as a call for service by the victim.

Q. Who is the victim?

A. Linda O'Donnell.

Q. What happened when you received the dispatch call? Where did you go?

A. I went to her residence. I can't remember the exact address. And I responded to her house and she was there, and she explained to me what happened.

Q. And what did she tell you happened?

A. She told me that Mr. Patane had been previously picked up on a charge of domestic violence and she had a restraining order against him at the time. And he had called her and violated that restraining order.

Q. Who was she in relation to the defendant?

A. They were ex-girlfriend and boyfriend.

Q. And was she the subject of this restraining order?

A. Yes.

Q. And how long was the temporary restraining order in effect?

A. It was in effect for 72 hours after he is let out of jail.

Q. During this time is when you received this complaint?

A. Correct.

[5]

Q. What did she tell you happened?

A. She said that she had gotten a phone call, and when she answered the phone the person hung up. She did a star 57 and then a star 69, and she recognized the phone number as that of Mr. Patane's.

Q. How did that violate the restraining order, that conduct?

A. He is instructed by the Judge when he is let out of jail to have no contact whatsoever with the victim, either by phone, indirectly or directly.

Q. I would like you to look at Exhibit B in the black notebook in front of you. It's white, sorry. It's a front and back. What is this document?

A. This is the actual domestic violence summons that I completed.

Q. What day did you complete this?

A. On the 6th—6th of June.

Q. When did you complete this in relation to your conversation with Ms. O'Donnell?

A. Immediately while I was there, I completed it after she had completed her statement.

Q. What is the second page, Probable Cause Affidavit? What is that?

A. That is my probable cause to believe that he violated the restraining order, which is what I have notarized and then placed him into jail with.

[6]

Q. If you would look at Exhibit A, please, what is that document?

A. This is the statement that the victim, Linda O'Donnell, filled out and signed.

Q. When did she fill that out?

A. While I was there on the 6th of June.

Q. What is Colorado Springs Police Department policy in domestic violence cases?

A. We take the statement. We complete the summons. And we immediately attempt to contact the suspect to place him under arrest.

Q. When you say, "We complete the summons," that's the document Exhibit B?

A. Correct.

Q. Why did you immediately attempt to place the suspect under arrest?

A. Because they are—that is policy. And they are normally, as in this case was, they were

afraid for their safety or their life.

Q. What else did Ms. O'Donnell tell you concerning that?

A. With regard to being afraid for her safety or life?

Q. Yes.

A. She said that she knew that Mr. Patane had purchased a gun because she went to a gun show with him and that he purchased it there with her, and that he presently had it on him. And [7] she also mentioned that he had a list of other people that he wanted to kill

and that she was afraid that he was going to come back and kill her as well.

Q. So based on this conversation with Ms. O'Donnell and filling out the summons, what did you do?

A. She told me that he worked at Phil Long Ford until, I believe it was, approximately 5:00 o'clock, and so I attempted to go to Phil Long Ford. Before I got there I found out he was not at work, so I went over to his residence.

Q. Where is his residence?

A. His residence is 837 East Vermijo.

Q. Is that in Colorado Springs?

A. In Colorado Springs.

Q. Who was with you at the time you went there?

A. I went with Officer Mulso. Officer Mulso met me there and Josh Benner got in my vehicle as well.

Q. Who is Josh Benner?

A. He is an officer with the Colorado Springs Police Department temporarily with ATF.

Q. Was this the same day that you went over to the house?

A. Yes, it is.

Q. What happened when you got to the house?

A. I knocked—myself and Officer Mulso were at the front door, and I knocked — and Officer Benner went to the rear of the residence in case Mr. Patane attempted to run. And Officer [8] Mulso and I knocked on the door. A female came to the door.

Q. What were you wearing at the time?

A. I was wearing my uniform, police uniform.

Q. What was Officer Mulso wearing?

A. His police uniform.

Q. Please continue. What happened when the woman came to the door?

A. I asked if Mr. Patane was there, and she said that he was. And she went to get him and he came out to the door.

Q. What happened when he got to the door?

A. We asked him to step outside because we wanted to talk to him about this incident. And I asked him what happened, and he said—he denied having made the phone call. And I told him that he was under arrest and I asked him if he had his ID and if he would like to get his shoes on.

Q. Do you see Mr. Patane in the courtroom today?

A. Yes, I do.

Q. Could you please identify him by where he is sitting and what he is wearing?

A. This gentleman right here with the maroon shirt and black pants.

MS. HAZRA: Could the record reflect the witness has identified the defendant?

THE COURT: It so reflects.

Q.Where were you when you placed him under arrest?

[9]

A. On the porch, the front porch.

Q. Could you please look at—I think it's marked Exhibit F in the notebook. What is that a picture of?

A. That's the—that's Patane's—the front of his house.

Q. Is that the area where you placed him under arrest?

A. Yes. You see the dark area right up there which is a cement porch, that's right below the door right there.

Q. What happened after that?

A. Mr. Patane started to go back into his bedroom to get his ID and his shoes, and I followed him in along with Officer Mulso. And in Mr. Patane's bedroom he started crying and yelling and saying things weren't fair and that we were ruining his life.

And he started basically to freak out, and so for our safety we put him into handcuffs right there in the bedroom. He told me where his ID was and we—I got the ID out. And he refused to put his shoes on so for our safety we went ahead and took him back outside without his shoes.

Q. And at some point in time did Detective Benner come up?

A. When we were up on the grass, we had taken him off the porch already and were starting to walk him into the yard, that's when I called for Officer Benner to come up to the front of the house if he wanted to talk to Mr. Patane.

Q. And after Detective Benner was done with all his conversations with the defendant, what did you end up doing [10] with the defendant?

A. I placed him in the back of my police cruiser, and I brought him into jail and booked him into jail.

Q. What charge did you book him on?

A. Domestic violence, violation of restraining order.

Q. While you were inside the house with the defendant getting his shoes, did you ask him permission to search his house at all?

A. No, I didn't.

Q. Did you seize anything from the house?

A. No, I didn't.

Q. And how did you let the defendant know he was under arrest when he was outside on the porch?

A. I told him he was under arrest for domestic violence, violation of restraining order.

MS. HAZRA: If I could have one moment, Your Honor. I have no further questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. GRADY:

Q. Officer Fox, what did you do before you were a police officer for Colorado Springs?

A. I was a systems analyst with Computer Technology Associates.

Q.At the time that—on the day you arrested Mr. Patane —[11] and I am going to call who you call Mr. Patane Mr. Patane so you know who we are talking about—the day you arrested Mr. Patane, how long had you been an officer with the Colorado Springs Police Department?

A. Just over a year.

Q. Now, are you telling us that it is the policy of the Colorado Springs Police Department for officers to enable themselves with probable cause to arrest and—

let me rephrase the question. You have told us that you filled out a statement of probable cause after you interviewed Ms. O'Donnell, correct?

A. After she completed her statement, correct.

Q. Are you telling us that the Colorado Springs Police Department teaches you that that's all you need to do before going out to arrest an individual?

A. No.

Q. Does the Colorado Springs Police Department teach you to verify a claim made by an individual when that individual makes that claim?

A. It puts—it empowers us with the ability to make a decision for ourselves to gather probable cause to make the arrest.

Q. All right. Well, let's talk about what it is that Ms. O'Donnell told you on the 6th of June. First of all, you were dispatched to her house by the main dispatcher office?

A. Correct.

[12]

Q. So does that mean that Ms. O'Donnell made a 911 call to the Colorado Springs Police Department?

A. She could possibly have called the non-emergency line.

Q. Do you have any idea how or who she called to—in order or what she did to have you dispatched to her home?

A. No, I don't.

Q. Did you ask her what she did to have you dispatched to her home?

A. No.

Q. When you interviewed Ms. O'Donnell, she was complaining to you about a telephone call that she received two days earlier, correct?

A. Correct.

Q. So the violation she claims occurred did not occur on the day you were dispatched to her home, did it?

A. Correct.

Q. What she told you was that a party called her house, correct?

A. She received a phone call, correct.

Q. And whoever it was who called her did not speak to her, correct?

A. Correct.

Q. And in fact, in her own handwritten statement which appears in Defendant's Exhibit A, she does not refer to the caller as Mr. Patane at all, does she?

[13]

A. No, she doesn't.

Q. You took this statement from her, correct?

A. Correct.

Q. She refers to the caller as the other party, doesn't she?

A. Yes.

Q. What she tells you is that she recognized the telephone number as that being the telephone number of Sam Patane, correct?

A. Correct.

Q. Did you call US West or whatever telephone company services Colorado Springs to verify the person who subscribed to that number?

A. No, I didn't.

Q. So at the time that you arrested Mr. Patane, did you have any idea who, if anyone, that telephone number was subscribed to?

A. I based it on her belief that it was Mr. Patane's telephone number.

Q. So your answer is no, you did not have any other information to verify who subscribed to the telephone number listed in Defendant's Exhibit A?

A. Correct.

Q. And I take it that from time to time you have been trained that the police department can call upon US West telephone security for information about subscriber information, correct?

[14]

A. Correct.

Q. But you did not take advantage of that opportunity on this day?

A. No, I didn't.

Q. Was this a—was the 6th of June a workday?

A. Yes.

Q. And when you were at Ms. O'Donnell's home, had it yet reached 5:00 o'clock in the afternoon?

A. It was my workday. I don't know if it was a weekday.

Q. Would it be safe to say it was a Monday or a Tuesday?

A. I don't know.

Q. Do you have any idea who—or at the time that you arrested Mr. Patane, did you have any idea who, if anyone, would have had access to the telephone number listed in Defendant's Exhibit A by Ms. O'Donnell?

A. No.

Q. So at the time that you arrested Mr. Patane, based on Ms. O'Donnell's claim, you could not say who, if anyone, had called Ms. O'Donnell between the dates of June 3rd and June 6th, correct?

A. Correct.

Q. Did you, prior to your arrest, traveling to arrest Mr. Patane, obtain a photograph of him?

A. No, I didn't.

Q. Would that explain why it was that Mr. Patane was required [15] to go get his identification at the time that you got to his house?

A. No, ma'am. We give them the opportunity to provide the identification card. We have also made arrests without the identification card.

Q. Did you ask Mr. Patane at the time he came to the door whether he was, in fact, Sam Patane?

A. Yes, ma'am, I did.

Q. And are you trained to verify that the person you are arrested is the person that you intend to arrest?

A. Definitely.

Q. And would that then explain why it is that Mr. Patane was going to get his identification?

A. He was getting his identification because I asked him if he had any ID.

Q. And having asked him if he had identification, he then turned to go back in the house, correct?

A. Correct.

Q. And you on your own accord followed him, did you not?

A. Correct.

Q. At this point in time what you are telling us is you had told Mr. Patane he was under arrest or that you were going to arrest him, correct?

A. That he was under arrest, correct.

Q. But you had not actually put handcuffs on him?

[16]

A. That's correct, but he was still under arrest.

Q. And being under arrest, you then of your own accord and without invitation from Mr. Patane followed him back into his house, correct?

A. He was in my custody and control at that time, yes.

Q. It is at the point—and Mr. Patane's identification is somewhere in his bedroom, is it not?

A. Correct.

Q. There was a photograph of Mr. Patane's bedroom in Defendant's Exhibit J. Is that photograph of his bedroom?

A. It could be. The bed was in a different position and I don't know where the—the items in the bedroom were, but the bed was turned up against the wall.

Q. Other than the position of the bed in the room, was that the room where you followed Mr. Patane to get his identification?

A. I don't recognize the bedding.

Q. Do you recognize the room?

A. It could be any room. No, I don't recognize it as what I saw when I went there that day.

Q. Didn't we just show you this photograph 20 minutes ago before Judge Miller came out?

A. Yes, you did.

Q. Did you tell either me or Ms. Hazra you didn't recognize this photograph?

[17]

A. No. I heard you say that it was his bedroom and the bed was in a different position, but—

Q. Do you dispute this, that this is his bedroom?

A. No.

Q. Was there any other room you followed Mr. Patane to after you followed him into the house?

A. No. I just went through the living room right into his bedroom.

Q. Let's back up to Defendant's Exhibit I. Is that the front—I am sorry. Are you there?

A. Yes.

Q. Is Defendant's Exhibit I a picture of the front door of Mr. Patane's home?

A. Yes.

Q Does that photograph look familiar to you?

A. Not in particular.

Q. Do you remember the events of this day independent of—other than your report?

A. Yes, I do.

Q. You were asked to look at this photograph before we started court as well, correct?

A. Correct.

Q. How about Defendant's Exhibit H, does that look familiar to you as a place you had been before?

A. It looks the same as I, except some things are a little [18] different.

Q. Does that appear to be the front door of Mr. Patane's house?

A. Yes.

Q. And do you recall—and please feel free to use the photograph to refresh your recollection—whether the front door opens out to the front porch?

A. It shows that it opens out.

Q. Now, please turn to Defendant's Exhibit G. Is that the living room of Mr. Patane's home?

A. Yes, it is.

Q. Mr. Patane rents a room in this house, does he not?

A. He lives there is all I know.

Q. Prior to arresting Mr. Patane, did you do anything to determine whether, in fact, he does live there?

A. That is the address that was on his identification card.

Q. Well, but of course you got that after you arrested him, didn't you?

A. I had his date of birth before when I got it from Linda O'Donnell, and I ran him on the computer system. So I can get all his information from the computer system.

Q. Did the computer system give you this particular address?

A. Yes, it did.

Q. What computer system is that?

A. That's the computer system that's in my cruiser. That is [19] linked back to his driver's license.

Q. All right. When is it that you accessed this computer system?

A. When I made sure that there was an actual restraining order against him from Linda O'Donnell.

Q. Did you—let's talk about this restraining order. The restraining order was a temporary restraining order, correct?

A. Correct.

Q. It was a restraining order issued as a temporary condition of bond following his release from jail on June the 3rd, 2001, was it not?

A. Correct.

Q. Did you actually read the restraining order before you went to arrest Mr. Patane?

A. I believe I did. She had a copy of it there with her. And when you run it on the computer, it does come up on the computer system as well to verify.

Q. Did you take it with you when you went to arrest Mr. Patane?

A. No, I did not.

Q. Can you tell us today what the exact words of the no-contact order on the restraining order are?

A. No, I cannot.

Q. When you—getting back to Defendant's Exhibit G, when you enter the house, you have to walk through this living room to [20] get to the bedroom where Mr. Patane kept his identification card, correct?

A. Yes, ma'am.

Q. Are you familiar with the service that star—pushing the numbers star 57 on a telephone provides?

A. Yes.

Q. What does that service provide?

A. It serves as a documentation of the phone call that had just been placed.

Q. What kind of documentation?

A. I don't know what correct terminology there is.

Q. Well, Ms. O'Donnell told you that she pushed star 57 and then she pushed star 69, correct?

A. Star 57 actually shows a documentation of where—of the phone call that was made.

Q. Did you—

A And that's with the telephone company. Star 69 shows the phone call, tells the caller who made the phone call.

Q. Do you know whether one of these two numbers actually traces the call that was made?

A. Star 57.

Q. All right. And did you make any effort at all to see whether there was, in fact, a record of this particular

call being made from the number provided by Ms. O'Donnell?

A. No, I didn't.

[21]

Q. Had you ever done that?

A. Yes, I have.

Q. And what did you find out?

A. A telephone number of a person who made a bomb scare.

Q. I am sorry?

A. You asked if I ever—

Q. I am asking you in this particular case did you contact US West to verify whether, in fact, a telephone call had been made and traced?

A. No, I did not.

Q. You have never done that?

A. Not in this case, no.

Q. Other than your conversation with Ms. O'Donnell, did you receive any other information to verify the complaint that Ms. O'Donnell was making against Mr. Patane?

A. No, ma'am.

Q. Did Ms. O'Donnell tell you—you have talked to us about claims or accusations Ms. O'Donnell made regarding a gun, correct?

A. Yes.

Q. Ms. O'Donnell told you that she was with Mr. Patane when the gun was purchased, correct?

A. Correct.

Q. Did Ms. O'Donnell mention to you that at that time she was on bond for a case out of the State of Wisconsin?

[22]

A. No.

Q. Are you aware that at the time Ms. O'Donnell was on bond for a case out of Wisconsin?

A. I am aware now.

Q. Would you please look at the exhibits that are marked as Defendant's Exhibit D.

A. Okay.

Q. Is Defendant's Exhibit D a reflection or a copy of the court documents pertaining to the case filed against Linda S. O'Donnell in the State of Wisconsin?

A. It appears to be.

Q. And was it, at the time that you interviewed Ms. O'Donnell, conditioned upon that she not possess a weapon herself?

A. Correct.

Q. Did she make any reference to this problem she had at the time that you interviewed her?

A. No.

Q. And prior to your arresting Mr. Patane, did you run a criminal records check on the NCIC, National Crime Information Center computer?

A. No.

Q. So at the time that you arrested Mr. Patane, you had done nothing to verify the reliability of the

information that Ms. O'Donnell provided to you, had you?

A. That's correct.

[23]

Q. Did Ms. O'Donnell tell you when exactly it was that she had last seen this firearm she described?

A. No.

Q. Did Ms. O'Donnell tell you when it was that she had last seen Mr. Patane?

A. No.

Q. Are you the person who arrested Mr. Patane?

A. Yes.

Q. Was Officer Benner with you when you arrested Mr. Patane?

A. No.

Q. Was Officer Benner, was he still someplace behind the house to make sure Mr. Patane wouldn't escape out the back door?

A. Correct.

Q. How long after you arrested Mr. Patane in his bedroom did you—or you said his home, wherever you want to say you arrested him, how long was it that Officer Benner came around to converse with you?

A. Approximately five minutes.

Q. And at that point in time you had already had conversation with Mr. Patane, correct?

A. Conversation? I placed him under arrest.

Q. You told him what you were there for, didn't you?

A. Yes.

Q. You told him you were there because Linda O'Donnell had claimed he had violated the restraining order, correct?

[24]

A. Yes.

Q. And he told you that was not true, didn't he?

A. Yes.

Q. Did you, prior to telling him what he was under arrest for and why you were there, advise him of his *Miranda* rights?

A. No, I didn't.

Q. At any time during your contact with Mr. Patane did you advise him of his *Miranda* rights?

A. No, I didn't.

Q. And when you escorted him into the bedroom, I understand you say he became very upset and started to cry.

A. Yes.

Q. Were you present when Officer Benner questioned Mr. Patane about a gun?

A. Outside, yes.

Q. That was after you had put the handcuffs on Mr. Patane and taken him back outside?

A. Correct.

Q. What Officer Benner did was he told Mr. Patane, in addition to arresting him for violating the restraining order, that he wanted to know where the gun was, correct?

A. He read him his rights because he was going to ask him some questions.

Q. All right. Did Officer Benner get through the process of reading Mr. Patane his rights?

[25]

A. No.

Q. How far along did he get?

A. I believe the first sentence, because Mr. Patane said that he knew his rights.

Q. And Officer Benner quit reading the *Miranda* rights after that, didn't he?

A. And he asked him, "So you know your *Miranda* rights," and Mr. Patane said, "Yes, I do."

Q. Following that initial conversation, Officer Benner then began to question Mr. Patane about the whereabouts of the gun, didn't he?

A. Yes.

Q. And Officer Benner told Mr. Patane that it would in so many words assist him and assist his problem if he went and got the gun for Officer Benner, didn't he?

A. No.

Q. Didn't he tell—didn't Officer Benner tell Mr. Patane, "If you want to put yourself in front of this domestic violence situation, go and get the gun"?

A. No.

Q. The words "get yourself in front of the domestic violence situation" never came out of Officer Benner's mouth?

A. He said, "Get yourself in front of the situation." He didn't say, "If you want to get yourself in front of the situation."

[26]

Q. Tell me exactly what he said using those words.

A. I can't tell you exactly what he said, but he didn't ask him and he didn't give him any favors or offers in my case. My case was separate from what Josh Benner was there for.

Q. So Josh Benner wasn't there to arrest him for violation of a restraining order at all, was he?

A. Correct.

Q. He was there to basically seize a firearm, correct?

A. Talk to him about where the gun was.

Q. Is that right, Officer Benner—I am not sure I am using the correct title for him, but Detective Benner went to Mr. Patane's house in order to investigate his possession of a firearm, correct?

A. Correct.

Q. And to seize that firearm, correct?

A. I am not sure about the seize.

Q. Was there a discussion prior to arresting Mr. Patane about which one of you was going to go to the front door and who was going to go around back?

A. I told Officer Mulso that he was coming to the front and Josh would go to the back.

Q. When you were arresting—when you followed Mr. Patane into his house, did Officer—Mulso, is that?

A. Mulso, yes.

Q. Did he follow Mr. Patane into the house, too?

[27]

A. Yes.

Q. Did Officer Benner ever come into the house?

A. Not at that point.

Q. Well, did there come a point in time when Officer Benner did go into the house?

A. After Mr. Patane told him where the gun was and that he could go get it.

Q. And when Mr. Patane told Officer Benner where the gun was, this was after a series of questions involving the gun and where it was, correct?

A. Yes.

Q. So let me just make sure I am clear. You arrested Mr. Patane for a crime you did not observe, correct?

A. Correct.

Q. And a crime that you had not corroborated in any way, correct?

A. Correct.

Q. And you arrested him outside of his home and inside of his home, correct?

A. No.

Q. You arrested him outside of his home and then moved him inside—and then go ahead. You tell me in your words.

A. I arrested him outside, gave him the opportunity to get his shoes and his ID.

Q.And you followed him into his house without any invitation [28] by him, correct?

A. He was already under arrest and control, under my control.

Q. So your answer is yes, you did follow him into the house without any invitation by Mr. Patane?

A. Sure.

MS. GRADY: Thank you. I don't have any other questions.

THE COURT: Redirect?

MS. HAZRA: Just one minute, Your Honor.

REDIRECT EXAMINATION

BY MS. HAZRA:

Q. Officer Fox, did you ask the defendant any questions after you had him under arrest?

A. No, ma'am.

Q. You didn't seek to interview him in any way?

A. No, ma'am.

Q. I just want to turn again to Exhibit B, is it? Could you look briefly at it?

A. Yes.

Q. When you take this down, what is on the back page? What is that bottom box? You are swearing that it's true or—

A. That's correct. I am notarizing, swearing that it's true, that what I stated is true.

Q. And what is this document?

A. This is the Probable Cause Affidavit to place him under [29] arrest.

MS. HAZRA: Thank you. I have no further questions, Your Honor.

MS. GRADY: No, I have no questions.

THE COURT: May this witness be excused?

MS. HAZRA: Yes, Your Honor.

MS. GRADY: Yes.

THE COURT: You are excused. Thank you for your testimony.

MS. HAZRA: Detective Josh Benner.

(Josh Benner was sworn.)

THE WITNESS: I do.

THE COURT DEPUTY: Please state your full name and spell your last name for the record.

THE WITNESS: My name is Detective Benner, Josh Benner; last name, B-E-N-N-E-R.

DIRECT EXAMINATION

BY MS. HAZRA:

Q. Good afternoon, Detective Benner. Where are you employed?

A. I am employed with the Colorado Springs Police Department.

Q. How long have you been there?

A. About four and a half years now.

Q. What is your current assignment?

A. I am assigned with the Bureau of Alcohol, Tobacco & Firearms/Colorado Springs Police Department gun interdiction [30] unit.

Q. What are your responsibilities in that capacity?

A. To investigate all gun and narcotic, federal gun and narcotic investigations.

Q. Do you work primarily with ATF agents?

A. Yes, ma'am, I do.

Q. In that capacity as working with the ATF agents, did you become involved in an investigation of a Samuel Patane?

A. I did.

Q. Do you see him in the courtroom today?

A. Yes, ma'am, I do.

Q. Can you please identify him by where he is sitting and article of clothing?

A. He is sitting right next to defense counsel with a red shirt on.

MS. HAZRA: Could the record reflect the witness has identified the defendant?

THE COURT: So reflects.

Q. When did you first hear about the defendant?

A. ATF Agent in Charge Rich Marianos contacted me, stated he was informed by probation, a probation officer, that a person by the name of Samuel Patane was a convicted felon and was in possession of a firearm.

Q. Did Case Agent in Charge Marianos get any other information from the probation officer?

[31]

A. He stated that probation officer had him on his current probation list, and there might be a temporary

restraining order involved and another domestic violence complaint involved in the process.

Q. Did they give you any names of victims or anyone else involved?

A. Yes. The victim was Linda O'Donnell, in which ATF Resident in Charge Marianos gave me her phone number.

Q. After probation told Rich Marianos that he might have a gun, he told you the substance of this information?

A. Correct. He gave me the information and asked me to contact O'Donnell and reference that firearm.

Q. What was your—

A. Just to verify the information the ATF had given ATF Agent Marianos and just more information about the gun and Samuel Patane.

Q. When did you go to contact Ms. O'Donnell?

A. Right after I was given the information, I contacted her by phone.

Q. Do you recall the date?

A. I believe June 6. I don't recall exactly the time.

Q. Of this year?

A. Yes, ma'am.

Q. When you called her on the phone, what did you talk to her about?

[32]

A talked to her about the gun, and she stated that she had been with him when he bought a 9-millimeter or a

.40 caliber Glock at a gun show a month prior in Colorado Springs.

Q. What else did she say concerning the gun?

A. She stated that he had carried it with him most of the time and that she believed he wasn't supposed to have a gun even though he never told her that, but because there was a domestic violence claim she pressed on him in September of 2000, I believe, he was not supposed to have a gun.

Q. Did she tell you he had ever shot it?

A. She stated she never witnessed him shooting it, but that he had told her that he had shot it.

Q. And at this time what did you know about the defendant's criminal history?

A. Just that from probation that he was a convicted felon and/or domestic violence conviction and that he was on probation at that time.

Q. So at that time did you know if he was prohibited under the federal law from possessing a firearm?

A. If he was convicted, yes, he was prohibited.

Q. Based on this information concerning the Glock pistol, what did you do?

A. I continued the investigation at that point. Ms. O'Donnell stated Officer Tracy Fox was there taking a violation of the restraining order. At that point I talked to her a little bit [33] and was informed he had worked at Phil Long Ford.

Q. Who is he?

A. Samuel Patane worked at Phil Long Ford down in Motor City at Colorado Springs. At that point I told

Resident Agent in Charge Rich Marianos about that and we responded to the Phil Long Ford.

Q. Was the defendant there when you got there?

A. No, he was not.

Q. Where did you go next?

A. At that point I contacted Officer Fox and again stated that we didn't have any contact with him. She stated she was going to go out to his house. And I asked her if I could meet her there and talk to Sam Patane at that point, and she stated yes.

Q. Who went with you to the house?

A. Myself, Officer Fox and another officer. I don't remember his name.

Q. Were you in uniform at the time?

A. No, ma'am. I was in plain clothes.

Q. Where did you go when you first got to the house?

A. I was instructed to go to the back in case Mr. Patane decided to run at any case, and so I went to the back of the residence. I believe it's 827 East Vermijo and while Officer Fox and the other officer went to the front.

Q. Did there come a time when you left the back of the house?

A. Yes, ma'am, after I heard voices and Tracy Fox stated [34] everything was okay and he was in the front, then I responded to the front of the residence.

Q. Approximately how long was that time period?

A. Five, six minutes, maybe.

Q. When you got to the front, where was everyone? Who was out there?

A. They were out in the yard near—there is a gate at the front of their yard and he was near to the gate and the house.

Q. Who was "he"?

A. I am sorry, Samuel Patane.

Q. Who else was out there?

A. Officer Fox and the other CSP officer.

Q. Was there anybody else out there?

A. There was another lady. I thought it was his mother or someone else related to him in the front of the doorway.

Q. When you got there, what was the defendant— was he in handcuffs?

A. Yes, he was.

Q. What did you first say to him?

A. I identified myself. I had my badge around my neck, stated I was with the ATF gun interdiction unit and I was there to talk to him. At that point I started to read him his rights. I said, "You have the right to remain silent." He stated, "I know my rights." I said, "You know your rights?" He said, "Yeah, I know my rights."

[35]

Q. How much of his rights did you read him?

A. I just said, "You have right to remain silent." He was very concerned about the domestic violence complaint.

Q. And after he stated that he knew his rights and you affirmed that, what did you do?

A. I just asked him—I was interested in the guns that he owned and he stated, "That .357 is already in police custody." I said, "I am more interested in the Glock."

Q. Let's go back. What is the .357?

A. It was another firearm that I found out later from Ms. O'Donnell that he had in his possession and involved in some kind of a automobile theft and was recovered by the police department, Colorado Springs Police Department.

Q. So after you said you mentioned the Glock. What did he say in response?

A. He said, "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me."

Q. What did you say?

A. I said, "In order to be truthful about this whole matter—you have been truthful up to this point—I need to know about the Glock."

Q. What happened next?

A. He stated, "The Glock is in my bedroom on a shelf, on the wooden shelf."

Q. What did you—

[36]

A. I asked him if I could have permission to go get the Glock. He said, "Yes. Again, it's on the wooden shelf in my bedroom."

Q. What happened after you received permission to go in and get the firearm?

A. I went in. I believe the other lady followed in behind me. I went into his room. There is a gray case on

the second level of his wooden shelf behind some magazines. I opened it up, saw there was a Glock .40 in there. I turned to the lady, said, "Is there anything else in the room I should know about that you know about?" She said, "I didn't even know about the gun."

Q. How did you know where to find the gun again?

A. Sam Patane told me.

Q. You asked him if you could go get it?

A. Yes, ma'am.

Q. After you recovered the gun, what did you do?

A. Brought the gun out to him to show he had the gun. I asked him, "Have you ever used this in a crime?" He stated, "No." I said, "Has Linda O'Donnell ever shot this gun?" He said, "No." I asked him if he shot it. He said, "Yeah, a couple times. "I asked him where he got it. He said from a gun show about a month earlier.

Q. And then what happened?

A. At that point I told him I wasn't going to arrest him for the gun at this point because I wanted to do some more investigations. I believe Officer Fox was going to have to [37] arrest him for—or take him down to the Criminal Justice Center because of the violation of the restraining order.

Q. Did you at any point in time threaten the defendant?

A. No, ma'am.

Q. Did you—were you armed at the time?

A. Yes, ma'am. I was in plain clothes, but I had my sidearm to my side.

Q. Did you ever pull out your weapon?

A. No, ma'am.

Q. Did you ever hit the defendant?

A. No, ma'am.

Q. Did you ever promise him anything?

A. No, ma'am.

Q. Did the woman who accompanied you inside the house, did she object to you going in the house?

A. No. She just followed me, behind me.

MS. HAZRA: If I could have one moment. I have nothing further.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. GRADY:

Q. Detective, you didn't know who that woman was, did you?

A. No, ma'am, I did not.

Q. And you hadn't made any arrangements prior to going to Mr. Patane's house to find out who you might find there, had [38] you?

A. No, ma'am.

Q. So you didn't even ask this woman if it was all right to go into the house, did you?

A. No, ma'am, I did not.

Q. Let's talk about the information that you received from Special Agent Marianos.

A. Sure.

Q. Special Agent Marianos told you he received a telephone call from a probation officer?

A. Yes.

Q. At the time that you arrested Mr. Patane, did you know what jurisdiction this probation officer worked in?

A. El Paso County.

Q. At the time you arrested Mr. Patane, you knew that?

A. I just assumed it because probation calls us all the time.

Q. That's not my question. My question is at the time that you arrested Mr. Patane, did you, in fact, know what jurisdiction this probation officer worked in?

A. I did not arrest him at the time.

Q. Well, let me rephrase the question. At the time that you went to Mr. Patane's house and had contact with him, did you actually know what jurisdiction this probation officer worked in?

A. No, ma'am.

[39]

Q. Did you know at the time that you went to Mr. Patane's house whether, in fact, this probation officer was reporting an observation that he or she made personally?

A. Whether she saw the gun; is that correct?

Q. Correct.

A. No, ma'am.

Q. So to the extent that this information was relayed by a probation officer somewhere to Special Agent Marianos, you had no idea how it was that probation

officer came to have this particular information, did you?

A. Correct.

Q. You did write a report summarizing the events of that day, did you not?

A. Yes, ma'am.

Q. And did you write that report based upon your conversations with the other people who were present during the arrest of Mr. Patane?

A. I wrote about those incidents, that's correct.

Q. In fact, you were actually not present at the point Mr. Patane was arrested, were you?

A. No, ma'am. I was in the back.

Q. But in your report, which it appears as Defendant's Exhibit C, if you would like to turn to the notebook, you describe in some detail the events of the arrest of Mr. Patane, do you not?

A. I just stated that he was arrested by Officer Fox, I [40] believe.

Q. Well, please—your report is three pages long, isn't it?

A. Yes, ma'am.

Q. Please turn to Page 2 of your report.

A. Okay.

Q. In your report, the bottom paragraph of Page 2, you wrote, Officer "Fox was able to place Patane under arrest without incident inside the home of Patane," correct?

A. Correct. I did write that.

Q. Now, I take it that that was based upon information that Officer Fox supplied to you, correct?

A. When I came out he was under arrest, so I assumed that everything was okay because she said everything was okay, that he was arrested under the domestic violence, yes.

Q. So your answer is yes, that was based on information that she supplied to you?

A. Sure. When I came out he was arrested, in handcuffs, so I assumed he was arrested. There was no fight. There was no incident, I guess is what I am trying to say.

Q. All right. Well, this is a report that you had reviewed by your supervisor, Sergeant Reisler, is it not?

A. Correct.

Q. You are trained not to write and report assumptions and guesses, are you not?

A. Correct.

[41]

Q. So you did not have actual conversation with Mr. Patane until he was in a pair of handcuffs?

A. Yes, ma'am, that's correct.

Q. And at that time you began to read him his *Miranda* rights?

A. Correct.

Q. But it is fair to say that you did not read him his *Miranda* rights, correct?

A. He stated he knew his rights. I asked him again, "Do you know your rights?" He answered, "Yes."

Q. Of course you didn't know at that time how or in what context Mr. Patane might think he knew what his rights were, did you?

A. When somebody tells me he knows his rights, I believe him. I said, "You have the right to remain silent." He said, "I know my rights." I said, "You know your rights?" He said, "I know my rights."

Q. Was there some emergency going on at that point in time, Detective Benner?

A. I don't understand what you mean by emergency.

Q. Was there something going on that prevented you from saying to Mr. Patane, "I understand, pal, but I am going to read you your rights anyway"?

A. No, ma'am. He was acting very upset. I was trying to calm him down. I just said, "I need to talk to you about the gun." It was very—I was just trying to get him to calm down [42] because once outside the home he was very upset.

Q. So because he was very upset, you did not insist on reading him his rights?

A. Once he said he knew his rights, I did not.

Q. I take it he remained very upset while you began to question him about a crime more serious than a violation of a restraining order?

A. He was up and down. At first he was very upset, then I would calm him down, ask him some questions. He would get more upset about the domestic violence complaint. I told him I didn't have a lot to do with the domestic violence complaint. I was here to talk to him about the gun. So he was up and down as far as being upset.

Q. You continued to talk to him whether he was up or whether he was down?

A. Yes, ma'am.

Q. And when he was up and down, I take it you are talking about his objective demeanor?

A. Yes, ma'am.

Q. While he was up and down you told him that you were there to look for a 9-millimeter gun?

A. I told him I was there to discuss a 9-millimeter or .40 Glock.

Q. And what you told him—and if you would like to refresh your memory by turning to Page 3 of your written report—was [43] that he was being cooperative to this point. Those are words in your report, correct?

A. Yes, I did tell him that.

Q. Referring you to the top paragraph of your report—

A. I have it.

Q. —on Page 3. And your words were, quote, "And to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm"?

A. Correct.

Q. Well, now, I thought you just told us you weren't there to investigate a domestic violence.

A. I wasn't. I just wanted him to be truthful about everything.

Q. That is, in fact, what you told him?

A. Correct.

Q. When you say "get in front of a domestic domestic violence case," are you suggesting to him he would be helping himself regarding that particular charge by identifying the location of the gun?

A. No, ma'am. I was just explaining to him he needed to be truthful about everything, the domestic violence, the gun, whatever else. That's all I was asking him.

Q. Please explain to us what the words "get in front of the domestic violence case" means?

A. Just to be truthful about everything, to include the [44] domestic violence case, to include the Glock .40.

Q. Did you explain to Mr. Patane what you meant by the phrase "get in front of the domestic violence case"?

A. No, ma'am, because at that point he just started to talk to me about it.

Q. Well, he didn't actually start to talk to you about it at that point, did he?

A. He told me where the gun was.

Q. He told you about a .357, didn't he?

A. Correct. And I said I was more interested in the .40 or the Glock.

Q. I would like to back you up to your conversation with O'Donnell.

A. Sure.

Q. Did you actually, prior to going to Mr. Patane's house on the 6th of June, did you actually meet Ms. O'Donnell in person?

A. Before I went to the house with Ms.—

Q. Yes.

A. No, ma'am. I contacted her by phone.

Q. Did you, prior to going to see Mr. Patane, do anything to verify the information that Ms. O'Donnell gave you?

A. I verified the information the probation officer gave me with the information with Ms. O'Donnell. I did not go ahead and verify the information except the fact that Tracy Fox had a violation of restraining order signed complaint.

[45]

Q. The probation officer didn't give you any information?

A. He stated that he was a convicted felon and in reference to a domestic violence complaint.

Q. Prior to going to Mr. Patane's house, you didn't have a conversation with the probation officer, did you?

A. I am sorry, the information the probation officer gave to Rich Marianos.

Q. When you say you verified that Mr. Patane—I am not sure what you are talking about here. What did you verify about Mr. Patane before you went to his house?

A. I just wanted to verify some of the information the probation officer gave Rich Marianos about Linda O'Donnell and if Linda O'Donnell actually did see a gun. At that point I was going out there to talk to Mr. Patane about the gun.

Q. My question is when you use the word "verify," what exactly do you mean?

A. Verifying that there was a domestic violence complaint, and Ms. O'Donnell stated yes, I did press a

domestic violence case against him in September of 2000.

Q. When you say verify there was a domestic violence case, you verified it by talking to this person named Linda O'Donnell on the telephone?

A. Correct.

Q. Other than that, did you contact a court to verify it?

A. No, not at that time.

[46]

Q. And other than that—and again we are talking about this period of time prior to your going to Mr. Patane's house—did you run any kind of criminal history check to see whether or not the person who provided you with this information might have a criminal history herself?

A. No, ma'am, I did not.

Q. And did she mention to you that she was on bond for an offense involving a firearm?

A. No.

Q. Ms. O'Donnell did not tell you when it was she last had seen Mr. Patane, did she?

A. No, she did not.

Q. She did not tell you when it was she had last seen the firearm, did she?

A. No, ma'am.

Q. She told you that he kept the firearm on his person or in his car, didn't she?

A. Correct.

Q. When you went to Mr. Patane's house, did you make, prior to going there, make any attempt at all to confer with the prosecutor about whether you could get a search warrant?

A. No, ma'am, I did not.

Q. Did you ask Ms. O'Donnell what kind of car she may be talking about?

A. She stated, if I remember correctly, he had several cars, [47] but I did not ask her for a specific car, no.

Q. All right. So you wouldn't have known what car a gun might have been in at the time you went to Mr. Patane's house, correct?

A. Correct.

Q. Prior to going into Mr. Patane's house to look for the firearm, had either you or Officer Fox conducted a pat-down search of his person?

A. I did not. I don't know if Officer Fox did.

Q. So you did not, at the point in time when you are questioning Mr. Patane, you didn't even know whether he had a firearm on his person, did you?

A. I did not.

Q. And you did not ask him whether he had a firearm on his person, did you?

A. No.

Q. Even though Ms. O'Donnell had said to you he carries it either on his person or in his car, correct?

A. Correct.

Q. Do you recall seeing a child in the house when you got there?

A. I don't remember seeing a child. I remember seeing a dog.

Q. The dog is in the photograph, isn't he? You want to look at Defendant's Exhibit—

A. Which one?

[48]

Q. —F?

A. Yeah.

Q. Is that Mr. Patane's house?

A. I believe so, yes.

Q. Would that be the dog inside the gate?

A. Yes.

Q. Does that picture show there is a mailbox outside of the gate?

A. Yes, it does.

Q. To get into—the gate was closed when you got there, wasn't it?

A. I am not sure. I went right to the back.

Q. How did you get to the back?

A. There is an alley to the right of the picture to get around to the back.

Q. That chain link fence runs all the way around the house, doesn't it?

A. I don't know. I was able to watch the back door from the back.

Q. From where in relation to the chain link fence?

A. I don't remember there being a chain link fence in the back, ma'am.

Q. So you don't remember—you were in the backyard of Mr. Patane's house, weren't you?

A. Yes, ma'am.

[49]

Q. Do you recall how it was you got in there in the backyard?

A. I remember going through an alley and being able to look at the door of Mr. Patane's house, but I don't remember a chain link fence. I will be honest.

Q. In your report, in Exhibit C, you don't mention being in the back of the house at all or watching it from behind, do you?

A. I don't believe I do, no.

MS. GRADY: I don't have any other questions. Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. HAZRA:

Q. Detective Benner, from whom did ATF first receive knowledge that the defendant could possibly have a firearm?

A. Probation department.

Q. And is ATF—as a part of ATF, are you constantly in touch with probation?

A. Yes, ma'am.

Q. What probation department is that?

A. El Paso County.

Q. And is that the county Colorado Springs is in?

A. Yes, ma'am.

Q. After you received the information from probation, why did you go talk to Ms. O'Donnell?

[50]

A. Just to get some more information and reference the information the probation officer gave Rich Marianos.

Q. So you wanted to talk to two people about it?

A. Correct.

MS. GRADY: I object to the form of that question. I am not sure he said he went to talk to two people.

MR. HAZRA: I can rephrase, Your Honor.

Q. So you wanted to talk to two different sources of information?

A. Correct.

Q. When you came around from the back of the house to the front, I believe you already stated the defendant was in handcuffs?

A. Yes, he was.

Q. Is it police procedure to place someone in handcuffs after patting them down?

A. Yes.

Q. Is it customary to do that?

A. Yeah, for officer safety you want to pat everybody down.

Q. At the time that you went to the defendant's home, did you know anything about the restraining order concerning the defendant?

A. Not at that point. I think there was one mentioned, but I didn't verify it, no.

MS. HAZRA: I have no further questions, Your Honor.

[51]

THE COURT: May this witness be excused?

MS. HAZRA: Yes, Your Honor.

MS. GRADY: Yes.

THE COURT: You are excused. Thank you for your testimony.

MS. HAZRA: I have no further witnesses, Your Honor.

THE COURT: All right. Ms. Grady, do you have any witnesses?

MS. GRADY: I have no witnesses, Your Honor.

THE COURT: I am sorry. The door was being shut. You said yes or no?

MS. GRADY: I have none, thank you.

THE COURT: All right. Do you wish to further argue your motion?

MS. GRADY: I do, Your Honor.

THE COURT: Let's take a brief break and—we will take a 15-minute break and then we will have argument. We will be in recess for 15 minutes.

(Recess at 3:10 p.m.)

(Reconvened at 3:30 p.m.)

THE COURT: Ms. Grady, what is your argument?

MS. GRADY: Your Honor, my argument is a three-prong argument. And I think that the analysis here begins and ends at the first prong which is probable cause. The state of the record here is that a naked accusation was made by a person who [52] has not testified before the Court, whose credibility was never investigated or verified, whose accusations were never corroborated in any way. And based upon that naked accusation, Mr. Patane was arrested. And I think this is the classic example of arrest without probable cause.

We don't even know if the telephone number, and neither did the arresting officers know whether the telephone number that she cited is even connected to the address where Mr. Patane lived, much less whether or not the act which she claimed occurred two days earlier would even constitute a violation of this restraining order. So I think—I think that those are fundamental problems that existed which might rise to the level of reasonable suspicion to warrant a Terry-type contact with Mr. Patane, but certainly not warrant a rise to the level of probable cause.

THE COURT: Well, you are saying because the victim's statement does give a phone number and declare that that's the defendant's home number.

MS. GRADY: Right.

THE COURT: That would be admissible testimony if she were here to testify.

MS. GRADY: Well, I don't know if she were here testifying.

THE COURT: Well, I would agree.

MS. GRADY: Yeah.

[53]

THE COURT: I know people's phone numbers, and I don't have any hesitation—personal knowledge keeping several personal phone numbers, if you wish, but it's human reality that people learn phone numbers, particularly those people you are close to, so they do have that declaration. But what you are really saying is it wasn't verified.

MS. GRADY: The issue wasn't what she knew, but the officers, what the arresting officers knew at the time they arrested Mr. Patane. And that, I think, is where the government's argument that this arrest was supported by probable cause fails because the officers don't know enough information to verify or even, I think, frankly, suspect that Mr. Patane even made the telephone call from the particular number.

And I think it's important to take into account that this accusation that was made by Ms. O'Donnell recounts an event that occurred two days before she reported it. So that again was not taken into account by the officers, and I think should have been before they decided to simply arrest Mr. Patane. Yes, they can go to the house. They can ask him about it, but that's not what they did.

They arrested him and then they—and really they didn't really ask him about the violation of the restraining order. They asked him about the crime of being in possession of the firearm. So I really think that what this really is, [54] was an ATF investigation that was advanced by virtue of this person's accusation that he had violated the restraining order and perhaps was an attempt to bootstrap that accusation into a basis for arresting Mr. Patane; and that, in fact, is what they did. So I think that's where the probable cause analysis here fails is that the officer who was sent in to conduct

the arrest really had no reasonable and articulable basis, in fact, to do it. So that, I think—that's the probable cause analysis.

And the problem here with the facts that were in the hands of these officers at the time that they went to arrest Mr. Patane—

THE COURT: Did they have probable cause to arrest him for the gun violation?

MS. GRADY: No.

THE COURT: Why not?

MS. GRADY: For exactly the same reason. She can't say when she saw him with the firearm. She can't say when she—she didn't say when she last saw him with the firearm, when she last saw the firearm, where she last saw the firearm. She doesn't provide them with enough information. Again, she is just making a naked accusation that he at some point in time was in possession of a firearm.

And the law requires, A, some reasonable—some indicia of reliability on the part of the person making the accusation; and, B, some degree of corroboration of the [55] accusation that is made, otherwise we have the problem that is warned of in the age old case of *Illinois v. Gates*.

And the *Anderson* case which I cited in my motion is interesting because there is a number of defendants who were involved, but in that case the Court rejected the government's probable cause analysis on facts which were to some degree corroborated by personal observations of the officers of one particular defendant, but in this case we don't have that. We just don't have corroboration that supports a warrantless arrest here,

nor do we have, although the government hasn't argued it, exigent circumstances.

So that again brings us to the question of what information is—what information do the arresting officers have in their possession at the time that they arrested Mr. Patane? That's the first analysis, the first prong of the inquiry.

THE COURT: Well, as I understand it, they have the complaint of Ms. O'Donnell. And as far as the arrest, the testimony before me is the arrest was for violation of a restraining order, which neither of you provided this to me, but a person commits that crime if the person contacts, harasses, intimidates, molests, threatens or touches. Which of those verbs did the defendant commit?

MS. GRADY: None. There is two operative words there. The first operative word is person. What person are we talking [56] about? We don't know based on even what Ms. O'Donnell reported to the police.

And second, I don't know and no one seems to have —certainly the government hasn't argued that he violated any particular aspect. If whoever he is or whoever that person is—or I guess the real question is, does one hang-up telephone call constitute harassment or touching or contact or the other words that you have described; and if it does, the second question is, well, who made the call?

So I am unaware of what particular ordinance the police were relying on in terms of violation of a restraining order. I did, you know, research the various ordinances and I researched whether or not there was some special exception under the Colorado Springs Municipal Code for violation of a domestic violence

restraining order and there isn't. The law simply is still that the police must have probable cause to arrest an individual for violation of the restraining order. You know, if there was an exception, I think it would be unconstitutional.

THE COURT: Is that it?

MS. GRADY: No. The second prong of my argument is the manner in which the police executed this arrest. Now, I understand that Officer Fox says that she only told Mr. Patane that he was under arrest at the front door, so she executes it when she follows him into the house to do it. I don't think [57] her subjective analysis here is relevant to the inquiry of whether he was in her custody or not in her custody at that time.

She follows him into the house uninvited and without a warrant to do that, so she crosses the threshold and she finalizes the arrest or effects the arrest by virtue of handcuffing him in the house. That is a *Payton* violation. And that, I have searched high and low in every circuit for a case that is just like this one based on those facts, and I can't find it. But in the *Anderson* case, which I did cite in this circuit, the police—the analysis is different and it turns on whether or not there was an exigency that existed. But the police followed the defendant or took the defendant back into the house or the apartment after they arrested him, and the government's argument at that point was there was an exigency which allowed them to do that. That's not being argued here, and it's plain why that is not being argued here.

But at any rate, there is no exception to the law as it's outlined in *Payton* that would justify Officer Fox arresting Mr. Patane in the house, and there is no break

in the events which transpired after that, which brings me to the *Miranda* violation.

THE COURT: Well, just a minute. Her testimony was that she arrested him outside.

MS. GRADY: She said she told him he was under arrest [58] outside.

THE COURT: That's right.

MS. GRADY: But she puts the handcuffs on him inside because she allows him to go back in the house to get his ID. And, you know, I don't think this analysis turns on semantics. You know, he is outside. She has arrested him for violation of a restraining order. If she is going to arrest him, arrest him. But she does it, you know, she says she tells him he is under arrest.

There is no reason for her to go into the house or to basically let him go into the house. So if she is letting him go back into the house, then I don't think she has effected an arrest yet, but I really think we are splitting hairs here to decide whether or not the arrest took place outside the house or inside of the house when the—

THE COURT: We are hardly splitting hairs given the—regardless, you may think of the authority. It's clear that she can arrest on the porch.

MS. GRADY: If she has probable cause to do so.

THE COURT: Yes. Well, we are setting aside probable cause now, and the uncontested testimony is she arrested him on the porch.

MS. GRADY: Right.

THE COURT: So he is arrested. The question then becomes whether somehow the entry into the house to

do this—[59] she says she is going to maintain control or custody of him and goes with him. I am not—I mean, let's put it this way. If the defendant had testified and said, "She didn't say I was under arrest until we were in the house and she put the handcuffs on me," then maybe you have got an argument. But given to me, what's represented to me is uncontested testimony that she arrested him on the porch. Do you have any authority that says she has to put the handcuffs on then?

MS. GRADY: No. I don't have any authority that turns—I think this is a very factually specific analysis in *Payton*. And frankly, before we wade through this particular aspect of the water, I don't think that any—that the Court's analysis turns one way or another on the *Payton* violation as I heard the testimony. I think it turns—the remainder of the analysis turns on the failure of Officer Benner, who is the person who begins to inquire about the possession of the firearm, his failure to actually read Mr. Patane his *Miranda* rights.

THE COURT: Before you get to that, if I agree with you on probable cause, do we even get to that issue?

MS. GRADY: No, I don't think we do.

THE COURT: It can't be delinked?

MS. GRADY: It could be, but not here. I think the delinking comes under the *Brown v. Illinois* analysis. And is there something that breaks the events in terms of time? No. [60] *Miranda*, certainly reading of *Miranda*, even if it had been done, doesn't under the law untaint the previous taint.

THE COURT: The reading itself.

MS. GRADY: Correct. It is not a cure-all Band-Aid. So certainly my position is that the beginning and the end of the analysis is probable cause and everything that flows therefrom is tainted evidence. But because he is basically in their custody unlawfully and he is questioned in their custody, no doubt about that, about the whereabouts of the gun, and whether you call it consent or whether you call it some statement that is the product of some inducement or promise by the officer, it doesn't matter because even if it was a clear consent, "Yes, I will go get the gun," that is simply the product of his unlawful arrest. And so it becomes an unlawful arrest, poisonous fruit issue.

THE COURT: Well, what about *Miranda*? What's your argument there, assuming I disagree with you, when you get down to the fact that he did not read the *Miranda*?

MS. GRADY: He says he did not read the *Miranda*. He only got so far as "You have the right to remain silent." And the duty is on the officer and on the government to make sure the defendant knows what his rights are. And there is simply no argument here that he did not read Mr. Patane his *Miranda* rights. And I know of no authority that says if a defendant says, "You don't have to read me my rights," you can't waive [61] the rights that you haven't been read. They have to be read. You have to know what you are waiving. That's the whole analysis of knowing and intelligent waiver is derived from. It's not a knowing and intelligent waiver if the rights haven't been read to him. So I don't understand why they weren't except that they simply weren't. And it doesn't matter why they weren't. They just weren't.

THE COURT: Well, the record is pretty bare other than the statement the officer made. I just took his word, assuming I believe the officer, he accepted that he knew his *Miranda* rights. And you are saying that's not sufficient waiver?

MS. GRADY: I am saying that's not sufficient. I don't think that, again, the Court's analysis turns on this particular aspect of the argument.

COURT: I understand.

MS. GRADY: But I think it definitely makes the water murkier here. If we are trying to somehow argue that there is an intervening event which clears things up, and you know, acts as an antidote, if that's the right word, to the events which precede it, the questioning about the gun, you know, one aspect, one line out of *Miranda* doesn't cut it. It only makes it worse. I think it just exacerbates the situation and doesn't help the government's argument.

Nothing here went by the law, not one single—with perhaps, you know, we can argue about whether there was or was [62] not a *Payton* violation. Evidence and the suppression of evidence seldom turns on a *Payton* violation, but it doesn't turn on whether or not evidence is seen as a result of statements made when a person is not lawfully in custody.

After that the analysis turns to whether or not there were some intervening events, and there were none. There is one other case I dug up, Your Honor, in searching for something that would be useful here regarding the probable cause analysis, and I have a copy of it. It is the case of *Whiteley*, W-H-I-T-E-L-E-Y, *v. Warden of the Wyoming State Penitentiary*. The citation is 401 U.S. 560, and it's a 1971 case, but it still

lives in this regard, which is that the police were relying on a bulletin that they received much like this one from another law enforcement agency, and based upon that went and arrested the defendant. It doesn't say whether the information received was from an informant or an unknown informant, but they did corroborate some of the information by observing a car that was driven by the defendant and some certainly observation. But the Court found in that case that the police are required to apply the same standard of review or at least to abide by the same standard of probable cause as any magistrate.

And the standard does not—is not lowered simply because it is the police making the analysis of probable cause as opposed to a magistrate. And the government's argument that [63] probable cause existed in this case was rejected by the Supreme Court. So it's very difficult, and I think not useful to compare the facts of any particular probable cause analysis, but there was some corroboration by the police in this case and that was rejected.

But really here what I think is important and what *Whiteley* warns us against is providing—is allowing the police to abide by a lesser standard or at least a diluted standard of probable cause just because they were the police and not because they are a judicial entity. And easily they could have gone in these particular circumstances. Time is obviously not of the essence. It wasn't of the essence especially to the woman making the complaint. They could have gone and asked for an arrest warrant from a judge, and they did not. It doesn't matter why they did not, which is why I didn't ask anybody. It just doesn't matter. They didn't.

THE COURT: If the complaining party had asserted that the defendant called her, is that sufficient probable cause?

MS. GRADY: If she said she had a conversation with him on the telephone?

THE COURT: Yes.

MS. GRADY: I think that would have risen to the level of reasonable suspicion, but I did look for authority on that particular subject as well, and I could find no case on point. So I am not prepared to stick my neck out and say that would [64] rise to the level of probable cause.

THE COURT: My concern is what more would have to be done. It seems to me if the victim—if indeed the defendant calls and violates the restraining order and the victim doesn't know from where he called or could not obtain any corroboration in any way, why that alone is not sufficient as a victim IDs the defendant. It seems to me that that should be sufficient, as sufficient as if he had assaulted her.

MS. GRADY: In the cases that I looked at involving allegations of restraining order violations, the police have always done something else other than just accept the person's—the complaining witness' word. And usually what happens is the police go to the defendant's home and ask him questions about whether or not he did, in fact, make the call. So that, I think—and if we had that situation here, I would be arguing to the Court that some conversation, you know, should have been had under the *Terry* analysis first before going to, you know, before arresting him.

THE COURT: I am troubled with that, because that would mean all the restrained individual has to do

is say no, and then he or she is beyond arrest. I thought we were trying to avoid that sort of—this is only a domestic dispute and we are not going to get involved with mentality.

It seems to me that somewhere along the line an officer has to be able to rely on the victim's statement. I am [65] not saying that's what happened here, but I am troubled if you say there is an absolute—there has to be or there should be an absolute rule of some sort of corroboration by other means.

MS. GRADY: I don't know, and I am certainly not suggesting because it's a domestic violence case that somehow dilutes the responsibility of anyone or the review, dilutes the review here at all, but I think it's not what happened here. And we don't even know if she is a victim of a order violation. We just don't know that.

You know, again, I go back to the fact that it is an event which occurred two days before she reports it. That should have some meaning in the Court's—you know, in the officer's analysis of whether or not it even happened.

THE COURT: It certainly would have something to do with the exigency of the circumstances, I guess.

MS. GRADY: Well, it does. And I think it simply plays into the question of whether it even happened at all. And you know, I don't know, but I think in that particular circumstance it probably wouldn't even matter if Ms. O'Donnell came here into court and testified because the real issue is what the officers know at the time they arrested Mr. Patane.

THE COURT: Anything else?

MS. GRADY: No. Thank you, Your Honor.

THE COURT: Ms. Hazra?

MS. HAZRA: Yes, Your Honor. This comes as a [66] surprise, I disagree with the defense counsel. I think in this case the police had adequate probable cause to arrest the defendant. I think the key here is that it's not that the police officers had to actually prove beyond a reasonable doubt that the defendant committed a violation of the temporary restraining order, but they at the time had to have a reasonable belief to cause a prudent person to think the defendant had done it.

In this case, Officer Fox goes to speak to the victim, O'Donnell. She is told by the victim that the defendant is to have no contact with her whatsoever. She is told then that the victim—the defendant did call her. The victim recognizes the phone number because she is the defendant's prior girlfriend.

Officer Fox then gets a copy of the temporary restraining order and looks at it and confirms these terms are true and also checks it out in her computer she told you. She printed out and confirmed the defendant was not supposed to have any contact with Linda O'Donnell, the victim in this case. At that point in time Officer Fox had probable cause to believe that the defendant has committed a violation of the conditions of the temporary restraining order. Even though he is not supposed to contact the victim, he has.

It's also important to note at the time of the conversation the victim Linda O'Donnell told Officer Fox that [67] the defendant had a gun, that he went to a gun show and bought the gun, and that she was very fearful of him and what he could do, what he would do to her.

So in this case, I mean, I think it's also important to note this is a domestic violence context, that there isn't that many witnesses to this. It's going to be what the victim says and what the defendant says, and in this case she had probable cause necessary to go forward and arrest him. I disagree the ATF needed to bootstrap onto this.

Actually, ATF had two sources that said the defendant was a prohibited person, was not allowed to possess a firearm. They received information from the probation department that supervised the defendant that probation was aware he had a gun—that they thought he had a gun, excuse me. And then they went —ATF went and confirmed this information by talking to Ms. O'Donnell who said the defendant and she had gone to the gun show and the defendant carried this gun with him at all times. At that point in time they knew he had a gun from two different sources. One was the probation department and one was his ex-girlfriend.

THE COURT: But he wasn't arrested. The complication in my mind, Ms. Hazra, is that, quite frankly, I would say there was more probable cause to arrest him for the gun violation than there was for the violation of the temporary restraining order, but that's not what happened. Ms. Fox [68] should have been the one at the back door and Mr. Benner the one at the front door.

I, you know, let me just ask you this. Why, when you do have a deep corroboration concerning the gun, why didn't the gun violation become uppermost in the officers' minds, and proceed and ask questions and do something with regard to the gun?

MS. HAZRA: I believe that's why they were at the house. They wanted to conduct an interview of the defendant.

THE COURT: But did they want—is it—well, I shouldn't speculate, but it doesn't—let me ask you. How was the violation of the statute committed?

MS. HAZRA: Well, Your Honor, the temporary restraining order in the statute says they are to have no contact, and a telephone call does constitute—

THE COURT: What contact did he have with her?

MS. HAZRA: He called her.

THE COURT: How do we know that?

MS. HAZRA: Because when she did the star 69 and star 57, it goes back to his phone number.

THE COURT: It does go back to the number, but the call was terminated; is that right?

MS. HAZRA: That's correct, Your Honor. But getting calls frequently and hang-ups and contact also can be incredibly harassing as well.

[69]

THE COURT: As I understand, as I understand, this only happened once.

MS. HAZRA: Yes, Your Honor.

THE COURT: What—if indeed I am willing to assume this was the defendant that made the call, dialing it in and then he thought maybe I am not supposed to be doing this. I think I better hang up.

MR. HAZRA: But, Your Honor, he didn't.

THE COURT: Did he commit a crime?

MS. HAZRA: Under the terms of the temporary restraining order, he did.

THE COURT: I don't have the temporary restraining order.

MR. HAZRA: But you have the testimony of Officer Fox, as well as you have the statement that she said no contact.

THE COURT: I understand that. I will accept it says no contact because that's what the statute says, but I am just saying what if the defendant said this isn't—"I shouldn't be doing this" and hangs up? Has he committed a crime?

MS. HAZRA: In terms of the temporary restraining order, yes. He also didn't hang up right away. Obviously, there is time for her to pick up the phone and hear him or hear something.

THE COURT: Where do you get that?

MS. HAZRA: S he said she picked up and the other party [70] hung up. Did I misspeak? I am sorry, Your Honor. "I answered the phone and the other party hung up," so it wasn't like as he dialed he was realizing I am not supposed to do that.

THE COURT: Let me give you another hypothetical, that as people will tell you, I call people thinking I am calling someone else and dial my home number, whatever. I just dial it. I dial the wrong number and somebody answers it. Sometimes I say, "Whoops, sorry. I misdialed," but I will have to confess here in open court that I have been embarrassed and hung up.

MS. HAZRA: Well, Your Honor, you are not under a temporary restraining order.

THE COURT: Well, I am concerned with probable cause. That is the totality of the probable cause link, is it not, to this defendant, that uncorroborated statement of the victim? I don't want to minimize that, as I indicated to defense counsel, but we don't have any corroboration of the number or anything else, but we also don't have any direct verbal communication as I understand the record.

MS. HAZRA: That's correct, Your Honor. But I think the key here is it is just probable cause. It's not that the police had to —

THE COURT: I recognize that, believe me.

MS. HAZRA: Moving on to the next point that the *Miranda*, the *Miranda* statements and the consent. I believe [71] Detective Benner indicated the defendant was aware of his *Miranda* rights. He started to read him his rights.

THE COURT: Do you have any authority on that? I understand. I just—what's a good case for me to look at as to that? The testimony is also unequivocal that the *Miranda* rights were not read, that he relied solely on the base on what the defendant told him.

MS. HAZRA: Partially.

THE COURT: That's uncontested. That's what the testimony is.

MS. HAZRA: I actually don't have a citation here, but I would be happy to provide the Court with some authority with permission.

THE COURT: I would ask you to do that.

MS. HAZRA: I certainly will, Your Honor. So he started to advise him and he clearly understood them.

And even if the Court was to find it was not a valid *Miranda* waiver, the evidence shows the statements were voluntary. There was no police coercion, no hitting, no gun drawing, so the statements were voluntary, as was the consent in this case.

THE COURT: It's also uncontested that he was handcuffed and in custody.

MS. HAZRA: That's correct, Your Honor.

THE COURT: And he was upset, at least at one time.

MS. HAZRA: But to find them not voluntary there has [72] to be some type of coercive police behavior, *Colorado v. Connelly*. Detective Benner did not testify he did anything that would constitute coercion, as did Fox. As you stated, Officer Fox testified the defendant was arrested outside on the porch.

'The Tenth Circuit in *United States v. Butler* 966 F.2d 619 has said after you place him under arrest, the officers can go inside a home to cover with clothing the defendant. It's sort of a limited exception understanding that once under arrest outside the home, defendants do need clothing or in some cases—in this case it was shoes, but you also recognize they may need a jacket or something. That is a permissible entry, especially in this case where there is no *Payton* violation because the arrest occurred outside the home.

THE COURT: I think that's the evidence as far as I know.

MS. HAZRA: Does the Court have any other questions for me?

THE COURT: No, I don't. I want to look at a couple of cases and I will reserve my ruling. When is this scheduled for trial? Pretty quick, right?

MS. HAZRA: October 9, I believe.

THE COURT: A couple weeks?

MS. HAZRA: October 9, almost two weeks.

THE COURT: You are the first set criminal case.

[73]

Assuming that I rule within the week, will you be prepared to go to trial?

MS. HAZRA: Yes, Your Honor.

THE COURT: Ms. Grady?

MS. GRADY: Yes. We are talking about alternatives, but we would be ready.

THE COURT: I was looking for an excuse to avoid having to rule within the next week, but I will rule and either do that by written order—if I do it by written order, I will advise you as soon as I have decided, even though the decision isn't written yet, or will call you in for a ruling and we will just do that. I want to read a couple of things.

MS. HAZRA: I can file those cases by tomorrow, Your Honor, if you would like.

THE COURT: I would appreciate it. If you have any particular case, Ms. Grady, you want me to look at in addition to that you have already given us, you can both have until 5:00 o'clock tomorrow to file cases, obviously besides the other cases that you have filed with me. Any questions?

MS. HAZRA: No, Your Honor.

MS. GRADY: Thank you for your time.

THE COURT: The defendant must be on bond?

MS. GRADY: Yes.

THE COURT: Any objection to his bond continuing?

MS. HAZRA: No, Your Honor.

[74]

THE COURT: Bond will continue, then, and we will be in recess.

(Recess at 4:10 p.m.)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Criminal Case No. 01-CR-228

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL PATANE, DEFENDANT

REPORTER'S TRANSCRIPT ORAL RULING

Proceedings before the HONORABLE WALKER D. MILLER, Judge, United States District Court for the District of Colorado, commencing at 11:00 a.m., on the 3rd day of October, 2001, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

Sunseeta Hazra, Assistant United States Attorney, 1225 17th Street, Suite 700, Denver, Colorado 80202, appearing on behalf of Plaintiff.

Virginia Grady, Federal Public Defender, 1099 18th Street, Suite 300, Denver, Colorado 80202, appearing on behalf of Defendant.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Janet Morrissey, 1929 Stout Street, Room C-109, Denver, Colorado, 80294, (303) 893-2835

[2]

PROCEEDINGS

THE COURT: We are here on Case No. 01-CR-297—excuse me, 228, United States of America v. Samuel Patane. I give up trying to pronounce it correctly.

Would counsel enter their appearance.

MS. HAZRA: Sunseeta Hazra, United States Attorney for the Government.

MS. GRADY: Virginia Grady appearing on behalf of Mr. Patane.

THE COURT: The issues before me are on motion to suppress filed by the defendant, and I am going to make some findings and conclusions here orally.

Factually it's important to note that the evidence is uncontroverted that the arrest took place on the porch of the defendant's residence; and, therefore, I am not resolving any *Payton*—that's P-A-Y-T-O-N—issues. The only evidence to the contrary is a reference in one of the officer's notes that—Officer Benner's notes that the defendant was arrested in the house. But he also testified that when he first saw the defendant, he was on the outside on the lawn, as I recall, of the house, Benner having been in the backyard.

And the *Payton* to which I refer is *Payton v. New York*, 455 U.S. 573, 1980 case. The defendant nevertheless has argued that there was no probable cause. As I recall the argument, the defendant asserts that it was a naked arrest without [3] probable cause, relying on the principles of *Illinois v. Gates*, 462 U.S. 213, 1983 case. And the arrest was for an alleged violation of the temporary restraining order and not for the possession

of a weapon by a felon, the crime with which the defendant is charged in this matter.

The evidence is also not controverted in the sense with regard to the charge. Indeed Officer Benner reports, I believe, and he testified to the same effect that he was not arresting the defendant on the felon in possession charge at that time as he would be conducting some further investigation. I have looked at the record to determine whether or not there is probable cause for the arrest on the violation of the temporary restraining order.

The evidence is that Linda O'Donnell, who had a previous intimate relationship with the defendant, complained about a hang-up phone call that allegedly occurred on June 4th. Her complaint to Officer Fox was on June 6th. And the complaint was that she had received a, one, hang-up call. And when she used the call-back service, star 69, it came from a number that she recognized as the defendant's.

During the interview O'Donnell—interviewed by Fox, O'Donnell also described the fact that the defendant had a gun, that she had been with him when he purchased it, that he kept it on his person in his room or in his car. And on the basis of that Officer Fox determined that she was going to—she had [4] probable cause to arrest the defendant, and her offense report is signed by her that there was probable cause that defendant had committed the offense with which he was charged.

The record and the testimony is unclear to me exactly how it was originated, but I note that there was communication between Officer Fox and the Officer or Agent Marianos with the Bureau of Alcohol, Tobacco &

Firearms, and that led to contact of Officer Benner. And on the same day Officer Benner and Marianos went to the supposed place of employment of the defendant, found he was not there, and by phone contact knew that Officer Fox was going to the residence. And Officer Benner went and met Officer Fox at the residence and came to the residence from the backyard.

As to the determination of the probable cause for an arrest for violating the temporary restraining order, I note that the—no one verified whether the call was indeed placed on the date from the numbers identified. No one determined whether the defendant would agree, and indeed when being arrested, he denied having made the call.

No one determined at the time the complainant's credibility and indeed arrest was being declared and was effectuated solely on the basis of this person's testimony of one hang-up call. And I also note for the record that there is no testimony of any type that there was a series of calls, and indeed even if there was evidence corroborating that the call [5] had been made, there is no investigation to determine whether or not it might have been made by mistake; as I noted to counsel that I certainly will confess and my life experience is that people do make calls to numbers with which they are familiar, not intending to make the call.

It's also possible that he may have started off and decided not to complete the call. But in any case, it was one call. There was no verification which presumably could have been done rather easily.

I also note that there is a two-day delay between the event and the call to the police, and then the Bureau is involved and an arrest is made that same day. There is

apparently—and I accept the testimony and it's not consistent with the exhibits, but Officer Benner said that he had been advised that a probation officer talked to Marianos—

MS. HAZRA: Marianos, Your Honor.

THE COURT: —Marianos sometime in this series of events, and that he had heard that the defendant may possess a gun, which may have been some corroboration of the O'Donnell statements, but that would be the only corroboration that the arresting officer had. And that corroboration is only that it may be she is telling the truth about the gun, but it has nothing to do with the crime for which he was arrested, namely the supposed unlawful contact in violation of a temporary restraining order.

[6]

I do note in connection with that testimony that Detective Benner in his notes, which are Exhibit C, states that on the day after the arrest he and Marianos met with the probation officer, and there is no mention at that time in the report of an earlier report. He does verify the convictions apparently, but that's the day after the arrest and would normally be something that one would expect a properly trained police officer to verify before arresting on a gun charge.

The arrest, therefore, I conclude was for violation of temporary restraining order based on mere suspicion. And I agree with defense counsel that this arrest without corroboration in any form concerning the crime involved does violate *Illinois v. Gates*, and the complete absence of corroboration, which could easily have been obtained with regard to at least the phone call, in a situation that is, unfortunately, not unusual for claims

and counterclaims to be thrown between people who have separated some sort of an intimate relationship is just inadequate and does not meet the standards of *Illinois v. Gates*. There has to be some corroboration of one individual's statement in these circumstances in my judgment. Therefore, I conclude that the arrest for the temporary restraining order violation lacked probable cause.

I think I noted—I just looked in my scribbles previously—that unfortunately what happened is that when the [7] officer went to the residence, she was going to arrest the defendant and she did so even though the defendant denied having made the call. So we have an arrest based upon—without any independent corroboration—one person to an intimate relationship where the actions are denied by the other, and there is not even a series of contacts or something of unexplained context. It's just one contact which I have indicated could, in my life experience, have been an innocent mistake; and nor do we know, incidentally, whether the phone in question is solely accessed by the defendant or others in the house where he lived. So there is a lot of reason to wonder what happened, and certainly one could have suspicion that it did happen and it may have been motivated by an intent to harass, but that's suspicion only. And as we all know, mere suspicion is not the same as probable cause.

The government argues notwithstanding that one might reach that conclusion with regard to that crime, that the defendant could have been—and that was the subjective intent of the officer to arrest, that the defendant—there was probable cause to arrest the defendant on the gun charge.

And I think the—I agree with the government that the knowledge of the individual officers, even though not communicated, is corporate knowledge and generally can be considered. And the government argues that under the objective standard there really was probable cause to arrest.

[8]

I am willing to assume, without deciding that that's the case, and if one assumes that there was independent evidence from the probation officer before the events of June 6, and that's—I am not deciding that issue. As I have noted, there is some conflict when you compare it to the documents, but assuming there was that corroboration, there may be probable cause—may have been probable cause to arrest, although obviously I note for the record that the officer didn't think so, that he felt he needed to continue his investigation and concluded that he didn't have probable cause.

But as Ms. Hazra correctly argues, that if indeed the arrest had been for the possession by felon and it's shown that there was knowledge with the officers to establish probable cause, there may well have been probable cause. Certainly assuming again that there was corporate knowledge of the probation officer's report at the time of the arrest, there is more evidence to support probable cause for that arrest than there is for the violation of temporary restraining order.

But the government presents an issue, and my findings I state that way because I am deciding in the first instance that even if there is probable cause to arrest on the gun on the date of the arrest, I still would suppress because of my conclusion that there is not

probable cause for the violation of the temporary restraining order.

And I need to explain that reasoning for any appeal.

[9]

And the authority cited by the government—I cited in particular *United States v. Davis*, 197 F.3d 1048, 1999 case. The way I read these cases, that that was one of these stops where there was various evidence considered, and the particular officer in his testimony for stating why he thought probable cause existed didn't include all of the items that could have been reported, and—or could have been considered.

And the Court is saying with regard to the particular charge, that if there is knowledge by the police officers that would otherwise constitute probable cause as to the charged offense for which the individual is arrested, that the Court can look to these other matters on an objective basis. But to allow the arresting officers after the fact to go back and scramble and look for evidence that might justify an arrest on another charge seems to me to be in many of the now almost trite phrases fraught with peril, stepped on a slippery slope, and would not be a good rule to establish; namely that even though you don't have probable cause to arrest for one crime, the one you are intending to arrest for, if you can go and find corporate police knowledge of another crime for which that individual could be arrested and justify the arrest after the fact and to relate back to the time of the arrest I just think would be inconsistent with our tradition of guarding liberties and requiring probable cause before we arrest people.

So even though there may be probable cause at the [10] moment of his arrest on the gun charge, I do not—

I would not allow that to establish a rule that could be misused or manipulated, which I just do not feel I can take that step, and government cites no authority that would justify that. As I say, the authority cited deals with the charged offense or with the individuals arrested.

We have talked—have I forgot anything we talked about? Okay. Do either of you have any questions? You, I guess, Ms. Hazra, I am ruling against you first.

MS. HAZRA: I have no questions, Your Honor. I would like to ask—I need to talk to my supervision in the appellate division about this.

MS. GRADY: Did you want to make any findings on the *Miranda* question?

THE COURT: As I did conclude, everything which flows from the arrest, which includes the *Miranda* questions and supposed waiver, it's unnecessary for me to make that ruling based upon my conclusion that all subsequent events tainted. I guess if there is an appeal and I am overruled, that issue should be resolved since we would have the hearing.

I will—I agree with the defendant that—and the thoughts expressed in *United States v. Bland*, 908 F.2d 471, Ninth Circuit case from 1990, that again with concern for manipulation of circumstances, that to accept a statement, and there is no contest that the statement was made, that I know my [11] rights and the rights are truncated at "You have a right to remain silent" and there is nothing else, whether there has been a knowledgeable waiver has not been established in the sense that, how do we know he knows his rights?

The statement by the defendant in the *Bland* case was even more direct, something to the effect that he

heard the rights a million times, and it was only the last sentence virtually of the *Miranda* warning that was omitted. And this, only the first sentence is stated. I think the only way you accept a waiver is—to avoid these arguments—to make sure that the person has knowledge is to say, well, do you know that, one, two, three, four, and that way this argument does not—had the officer done that and able to testify that he had done that, then we would have a knowledgeable, knowing waiver.

MS. HAZRA: Your Honor, the government actually concedes that it was not a knowing waiver, but I was just wondering if you would make a finding of voluntariness of statements if you are going to go on.

THE COURT: No, that would be the basis for my ruling. Anything else?

MS. HAZRA: No, Your Honor.

THE COURT: Where are we on speedy trial?

MS. GRADY: I didn't bring my copy of my motion. I don't know when it was filed.

[12]

THE COURT: Excuse me?

MS. GRADY: I don't know when I filed the motion to stop the clock. I am unhelpful. I don't know how many days we are, if we are on speedy trial, when I filed the motion.

THE COURT: Well, I direct counsel to schedule a trial and trial preparation conference within the—which dictates the speedy trial this week. That is, you need to set the trial this week for whenever.

MS. GRADY: Okay.

THE COURT: Any questions?

MS. HAZRA: No, Your Honor. Thank you.

MS. GRADY: Thank you.

THE COURT: We will be in recess.

(Recess at 11:34 a.m.)

* * * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 11th day of October, 2001.

/s/ JANET M. MORRISSEY
JANET M. MORRISSEY

VICTIM INFORMATION

CASE NUMBER 01-19094

Victim's Name	DOB	AGE	SSN	Cross Complaint? Y N Summons #
O'DONNELL, LINDA	07-07-57	43	524-90-0267	

Victim's Address: 822 CALVERT AVE, COLO SPGS, CO 80904	Home Telephone: 324-9175
Contact Address: SAME	Contact Telephone
Employer Address: NOT EMPLOYED	Work Telephone

Race	Sex	Height	Weight	Hair	Eyes
W	F	5-02	130	BLN	GRN

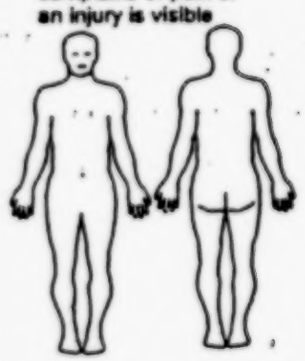
Child Name	DOB	Address (if different from victim)	Did Child Witness Incident Y N
Child Name	DOB	Address (if different from victim)	Did Child Witness Incident Y N
Child Name	DOB	Address (if different from victim)	Did Child Witness Incident Y N

Witness Name	DOB	Address	Zip Code	Hm. Ph. / Wk.(or contact) Ph.
Witness Name	DOB	Address	Zip Code	Hm. Ph. / Wk.(or contact) Ph.

Active Restraining Orders:	☒ Mandatory (72 hour)	☒ Temporary	☒ Permanent	☐ Domestic Relations	Court Case Number: 01M5058
Victim/Suspect Status	☐ Married	☐ Separated/Divorced	☒ Cohabitants	☐ Dating (Not Living Together)	☒ Other: INTIMATE RELATIONS
If Known Who Called	☒ Victim	☐ Family Member	☐ Neighbor	☐ Suspect	☐ Other

Check If Applicable	☐ Drugs	☐ Alcohol	☐ Pregnant	☐ Child Protective Services Notified Y N	☐ Animals in Home	☐ Humane Society Notified		
	☐ Throwing Things	☐ Pushing ☐ Shoving	☐ Grabbing	☐ Slapping W/Open Hand	☐ Kicking	☐ Biting	☐ Hitting W/ Closed Fists	☐ Choking
Weapons Involved	☒ No Weapons	☐ Weapons Displayed, But Not Used	☐ Assault With Weapon(s)	☐ Edged Weapons	☐ Firearms	☐ Blunt Objects	☐ Other	
Injuries Noted	☐ No Injury	☐ Pain, But No Visible Injury	☐ Visible Injury	Photographs (MANDATORY - IF VISIBLE INJURIES) ☐ Yes: ☐ 35mm ☐ Polaroid ☐ Video ☐ No				
Medical Attention	☐ Refused Medical	☐ Medical At Scene	Hospital or Medical Facility:					
Victim's Emotional State:	☒ Calm	☐ Angry	☐ Withdrawn	☐ Apologetic				
	☐ Crying	☐ Upset	☐ Scared	☐ Other				

Mark with an X any area where victim complains of pain or an injury is visible



Victim Questions:
Has the suspect ever done this before? YES If so, When?
Any previous violence with another person? YES If so, Whom EX-WIFE
Has suspect made threats? YES If so, What and to Whom?
Were all the injuries to the victim caused by this suspect? N/K If not, by whom?

VICTIM NOTIFICATION REQUEST

☒ THE ABOVE LISTED VICTIM HAS REQUESTED THAT HE/SHE BE NOTIFIED OF THE PENDING RELEASE OF THE DEFENDANT BY EL PASO COUNTY JAIL AUTHORITIES

VICTIM'S SIGNATURE Linda L. O'Donnell VICTIM NOTIFIED BY: DATE:

VICTIM'S STATEMENT: On Monday June 4, 2001 at 8:00 p.m. my telephone rang - I answered the phone and the other party hung up. I pushed *57 and then pushed *69. The last call return (*69) stated the last call received was (719) 471-3444. I recognize the phone number (719) 471-3444 as Sam Patane's home phone number.

State of Colorado } ss. County of El P...
Certified to be a ... and Correct
copy of the original ... thereof.

SEP 20 2001

LEE ...
CLERK OF THE ...
By ...

DEFENDANT'S EXHIBIT
A
01-CR-228-WM

000002

BEST AVAILABLE COPY

RECEIVED JAN 07 2002

D048633 2

COLORADO SPRINGS POLICE DEPARTMENT
X OFFENSE REPORT
DOMESTIC VIOLENCE COMPLAINT
THE PEOPLE OF THE STATE OF COLORADO (16-6-803.3)
X ADULT ☐ JUVENILE

Case Report No.	Call Screen No.
01-19094	798708
Booking No.	**MNI No.**
200109176	

Defendant Name (First) SAMUEL	(Middle) FRANCIS	(Last) PATANE	(Suffix)	DOB Mo 11	Day 13	Yr 49	Age 30				
Defendant's Address 837 E. VERMIJO ST.	(City) COLO SPGS	(State) CO		Zip Code	Home Telephone ( ) 471-3494						
Employer Name PAR LONG FORD 1212 MOTOR CITY DR	Employer Address (City) C/S	(State) CO	Zip Code 80906	Work Telephone ( ) 575-7151							
Place of Birth (City/State) NEW YORK	Race W	Sex M	Height 507	Weight 190	Hair BRO	Eyes HAZ	SSN 100-40-6231				

To Answer Charges of Violation(s) of 1973 C.R.S. as Amended:
☐ MISDEMEANOR
☐ FELONY
☐ BOTH
☐ DICTATED SUPPLEMENT

	Statute	Title
CHARGE No. 1	18-6-803.5	VIOLATION OF RESTRAINING ORDER
Description	SUBJ VIOLATED MANDATORY RESTRAINING ORDER BY CALLING VICTIM.	
CHARGE No. 2		
Description		
CHARGE No. 3		
Description		
CHARGE No. 4		
Description		

Approximate Location of Violation, City of Colorado Springs, County of El Paso: 822 CALVERT AVE	Violation Date 6-4-01	Approximate Time of Violation 2000	Companion Statement #
Items Placed in Evidence [ ]	Custody Location 837 E VERMIJO	Custody Date 06-06-01	Custody Time 1925	Cross Complaint #

☐ Weapons Involved ☐ No Weapons ☐ Weapons Displayed, But Not Used ☐ Assault With Weapon(s) ☐ Edged Weapons ☐ Firearms ☐ Blunt Objects Weapon Description:

Circle if Applicable (offender): Drugs Alcohol Sho/DI Registered Sex Offender Gang--Gang Se:
DVERT Involvement Y N
Scars/Marks/Tattoos
Aliases
Probation / Parole Officer Name

( ) JUVENILE COMPLAINT AND REFERRAL

CHILD'S SIGNATURE _____ DATE _____ TIME _____
PARENT'S SIGNATURE _____ DATE _____ TIME _____
Parents Notified: Y N Date: _____ Time _____ AM/PM
Officer _____ NO: _____

Mother's Name / Address	Home Phone	Work Phone
Father's Name / Address	Home Phone	Work Phone
Guardian's Name / Address	Home Phone	Work Phone

SIDS Referral Y N | 100 Families Y N | Interviewed Y N | Name of Parent / Guardian present during interview

State of Colorado, County of El Paso
Certified to be a true and correct copy of the original in my custody.
SEP 2 0 2001
CLERK OF THE DISTRICT COURT
By _____ Deputy

EMERGENCY CONTACT INFORMATION *(For Defendant)*

NAME (Last, First Middle)	RELATIONSHIP	ADDRESS	TELEPHONE

VICTIM INFORMATION

VICTIM'S NAME LINDA S. O'DONNELL DOB 07-07-57 SSN 524-90-0267
ADDRESS 822 CALVERT AV, C/S, CO 80904 TELEPHONE 328-9175

THE UNDERSIGNED HAS PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT COMMITTED THE OFFENSE(S) AGAINST THE PEACE AND DIGNITY OF THE PEOPLE OF THE STATE OF COLORADO.

/OFFICER: Lyn L Fox No. 1750 /OFFICER: D. MULSO No. 284
/SERVED BY: Lyn L Fox No. 1750
/COMPLAINING WITNESS X Linda S. O'Donnell DATE 6/6/01

DEFENDANT'S EXHIBIT 1105

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PROBABLE CAUSE AFFIDAVIT

ON 06-06-01 I OFFICER T. FOX/1750P WAS DISPATCHED TO 822 CALVERT AV ON A REPORTED VIOLATION OF RESTRAINING ORDER. THE SUSPECT, SAMUEL PATANE, HAD A TEMPORARY RESTRAINING ORDER ON HIM EFFECTIVE 06-03-01 EXPIRING 06-06-01 AT 1159 HRS. ON 06-04-01 AT APPROX 2000 HRS, PATANE, CONTACTED THE VICTIM, LINDA ODONNELL, BY CALLING HER ON THE PHONE. PATANE WAS ORDERED TO HAVE NO CONTACT WITH THE VICTIM.

THE ORIGINAL RESTRAINING ORDER WAS THE RESULT OF A DOMESTIC VIOLENCE CHARGE OF HARASSMENT. THE VICTIM ODONNELL STATED THAT PATANE HAS PREVIOUSLY THREATENED TO KILL HER. ODONNELL ALSO STATED THAT SHE WAS WITH PATANE WHEN THEY WENT TO A GUN SHOW AND PATANE PURCHASED A GUN. THE DISTRICT ATTORNEY FILED HARASSMENT AND MENACING CHARGES ON PATANE.

ODONNELL BELIEVES PATANE KEEPS THE GUN ON HIM OR LOCKS IT IN HIS VEHICLE. ODONNELL STATED THAT PATANE HAS THREATENED TO KILL POLICE OFFICERS AND THAT HE HAS A LONG LIST OF OTHER PEOPLE HE WANTS TO KILL. ODONNELL IS AFRAID THAT NOW PATANE HAS A GUN THAT HE WILL COME AND KILL HER.

UPON ARREST OF THE SUSP, HE ADMITTED TO HAVING A 9MM GLOCK WHICH HE TURNED OVER TO ATF AGENT JOSH BENNER.

PATANE STATED THAT HE NEVER CONTACTED THE VICTIM AND THAT SHE WAS FALSELY ACCUSING HIM. HE ALSO STATED THAT ODONNELL PURCHASED THE GUN.

UNDER PENALTY OF PERJURY, I AFFIRM THAT ALL THE INFORMATION CONTAINED UPON THIS DOCUMENT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

AFFIANT T. FOX/1750P Print Name TRACY L. FOX/1750P

On this date, The Affiant signed this Affidavit and swore to its truth

060604 R. Thomas

Date Notary Public

My Commission Expires 1/19/2005

~~5735 E. Las Vegas Street~~

My Commission Expires CO 80906

000004

(106)

COLORADO SPRINGS POLICE DEPARTMENT
OFFENSE ☒ INCIDENT ☐ SUPPLEMENT ☐

D A CCR G H F

CASE REPORT NUMBER: 01-19192

OFFENSE

TITLE: POSSESSION OF WEAPONS BY PREVIOUS OFFENDERS
STATUTE NUMBER: 18-12-108
LOCATION OF OCCURRENCE: 111 S. TEJON STREET #503
ZIP CODE: 80903

ZONE	SECTOR	DATE AND TIME OCCURRED	MONTH	DAY	YEAR	TIME	DAY OF WEEK	DATE AND TIME REPORTED	MONTH	DAY	YEAR	TIME	DEC CODE
2	1	ON OR BETWEEN	06	06	01	1725	WED		06	07	2001	1015	

AREA COMMAND: N. E (W)

UCR

OCL	OFF	CLS	STT	PREMISES	UCR OFFICER ASSAULT ACTIVITY	UCR OFFICER ASSAULT WEAPON	OCCUPATION

OFFICERS KILLED #	OFFICERS ASSAULTED #	NUMBER OF ARRESTS
0	0	ADULT 1 JUVENILE ___

☐ SUSPECT(S) CAN BE NAMED/LOCATED ☐ SUSPECT(S) CAN BE DESCRIBED/IDENTIFIED
☐ CRITICAL PHYSICAL EVIDENCE ☐ SUSPECT VEHICLE CAN BE IDENTIFIED/LOCATED

VICTIM

NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	DATE OF BIRTH	OCCUPATION
STATE OF COLORADO					

ADDRESS RES	CITY	STATE	ZIP CODE	BROCHURE	TELEPHONE (H-DAY)
					( )

BUS				
				( )

BUSINESS NAME (IF BUSINESS IS VICTIM)	BUSINESS ADDRESS	BUSINESS PHONE

CODES: RP – REPORTING PARTY W – WITNESS V- VICTIM P- POLICE OFFICER A – ARRESTEE S- SUSPECT *ONLY NECESSARY FOR SUSPECT/ARRESTEE

CODE	NAME (LAST, FIRST, MIDDLE)*	RES. ADD.	RACE	SEX	AGE	BROCHURE
S	PATANE, SAMUEL FRANCIS	837 E VERMIJO STREET CITY, STATE, ZIP COLO. SPGS. CO	W	M	50	

HT*	WEIGHT*	HAIR*	EYES*	BUILD*	TELEPHONE	DATE OF BIRTH	SUMMONS NUMBER(S)*
5-7	140	BRO	HAZ	MED	(W) 575-7151 (H) 471-3494	11-13-49	

CLOTHING*	ALIAS/NICKNAME*	CSPD NO.

VEHICLE

☐ STOLEN ☐ SUSPECT ☐ TOWED ☐ VICTIM ☐ OUTSIDE RECOVERY ☐ OWNER NOTIFIED ☐ LOCAL RECOVERY

VEHICLE YEAR	VEHICLE MAKE	VEHICLE MODEL	VEHICLE STYLE	VEHICLE COLORS – TOP/BOTTOM

VEHICLE LICENSE NUMBER	LICENSE TYPE	LICENSE YEAR	LICENSE STATE	VEHICLE LICENSE COLORS – PRIME/NUMERALS

VEHICLE IDENTIFICATION NUMBER/MOTORCYCLE FRAME NUMBER	VEHICLE TOWED BY/TO	VEHICLE INSURED BY	VEH. ENGINE NUMBER

VEHICLE OWNER (LAST, FIRST, MIDDLE)	ADDRESS	TELEPHONE

☐ PICKUP ISSUED FOR ABOVE VEHICLE ☐ PICKUP ISSUED FOR ABOVE SUSPECT ☐ PICKUP CANCELLED

(X) IF INCLUDED IN REPORT
☒ SUSPECT(S) ☒ WITNESS(ES) ☐ ADDITIONAL VICTIM(S) ☐ HOSPITALIZED ☐ PROPERTY DESCRIPTION(S) ☒ EVIDENCE INVOICE ☐ VICTIM STATEMENT(S) ☐ WITNESS STATEMENT(S) ☐ DICTATED SUPPLEMENT ☐ PRIORITY

PROPERTY

VIC NO.	ITEM NO.	QNTY	BRAND NAME	MODEL NO./SIZE	PROPERTY DESCRIPTION	SERIAL NUMBER	STOLEN (4) X-DAMAGED	RECOVERED ($)	UCR TYPE

DEFENDANT'S EXHIBIT
C
01-CR-228-WM

NARRATIVE

ELEMENTS/METHOD
ADDITIONAL OFFENSE: NONE SUSPECT INFO: YES EVIDENCE: YES

On 06-06-01 at approx. 1630hr I, Detective Josh Benner 1480P, was contacted by ATF RAC Marianos concerning a possession of weapon by a previous offender. According to ATF RAC he had information from the Probation Department that the suspect, Samuel Francis Patane DOB: 11-13-49, had a domestic violence conviction and was under a temporary restraining order. Further, Patane was also in possession of a Glock .40 caliber pistol after being convicted of a domestic violence complaint. I contacted the victim of the temporary restraining order, Linda S. O'Donnell, who stated Patane had the pistol with him at all times, either on his person, in one of his vehicle or at his house located at 837 E. Vermijo Street. While speaking with Ms. O'Donnell, I was informed Officer Fox 1750P was at her house documenting a violation of a restraining order complaint. Officer Fox and I contacted Patane at his house on 06-06-01 at approx. 1725 and he was placed under arrest for the violation of the restraining order. The Glock .40 caliber pistol was recovered from inside his home. The case was referred to ATF RAC Marianos for pending federal charges.

CERTIFICATION

UCR DISPOSITION	PATROL INVESTIGATION CONTINUING	ASSIGNED TO	DATE	COMPANION NUMBERS
☒ OPEN ☐ CLEARED BY ARREST ☐ UNFOUNDED ☐ EXCEPTIONAL CLEARANCE	YES ☐ NO ☒		060603	

OFFICER NAME/NUMBER	SUPERVISOR	DATE	PAGE
DETECTIVE J. BENNER 1480P	SGT. REISLER 379P		1 OF 1 (107)

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COLORADO SPRINGS POLICE DEPARTMENT
CONTINUATION/SUPPLEMENTAL REPORT

CASE REPORT NUMBER: 01-19192

OFFENSE	STATUTE NUMBER	UCR RECLASSIFICATION TO	UCR CODE
POSSESSION OF WEAPONS BY PREVIOUS OFFENDERS	18-12-108		

VICTIM'S NAME (LAST, FIRST MIDDLE)	DATE OF THIS REPORT
STATE OF COLORADO	06-07-01

ARRESTEE NAME (LAST, FIRST MIDDLE)	RES ADD / CITY & STATE	RACE	SEX	AGE	DOB
ARRESTEE NAME (LAST, FIRST MIDDLE)	RES ADD: / CITY & STATE:	RACE	SEX	AGE	DOB

Ms. O'Donnell stated he never once mentioned to her that he couldn't possess any firearms but she didn't think he could because he was on probation from a domestic violence complaint she had pressed against him in September of 2000.

Ms. O'Donnell said she never witnessed Patane shoot the weapon but he had asked several times where he could go to shoot the handgun. She had shot several firearms when she was younger and gave him a few ideas but she was never with him when he fired the weapon. One day he had told her he found a place to shoot the firearm and had just got back from shooting the pistol.

According to Ms. O'Donnell, Patane had been in possession of another handgun - .357 pistol that had been stolen from him by some kids. The Colorado Springs Police Department had recovered the pistol and notified Patane that it was recovered. Patane had asked her several times to go down to the police station and state the .357 pistol was hers and get it out of evidence for him. She refused but went down to the police station one time and told the investigating officer everything about the ownership of the .357 weapon. She couldn't remember the case number or the officer she had talked to about the .357 handgun. The .357 pistol was never returned to Patane or Ms. O'Donnell.

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Ms. O'Donnell knew Patane was on probation for the domestic violence complaint she had completed in September of 2000. She was the victim of a 3rd degree assault by Patane and she thought he was on probation for at least two (2) years.

When asked where Patane stored the Glock .40 caliber pistol, she stated he would usually keep it with him at all times. He would keep it in his waistband, in whatever car he was driving or at his house.

DETECTIVE STATEMENT CONT'D:

After the interview, Ms. O'Donnell told me Officer Fox 1750P was at her house taking a violation of a temporary restraining order complaint. I spoke with Officer Fox and she told me she would have a signed complaint for Patane's arrest for violation of the temporary restraining order. Officer Fox also stated he worked at Phil Long Ford until 5:00 p.m. located in Motor City.

ATF RAC Marianos and I responded to Phil Long Ford located at 1212 Motor City Drive and according to one of the supervisor's, Patane had already left for the day. I informed Officer Fox of this and we responded to his home located at 837 E. Vermijo.

On 06-06-01 at approximately 1700hr Officer Fox and I arrived at the location of 837 E. Vermijo to contact Patane. Officer Fox was able to place Patane under arrest without incident inside the home of Patane. Once under arrest I spoke with Patane just outside his house regarding the firearm Ms. O'Donnell had mentioned.

000006 (108)

UCR DISPOSITION	OFFICER NAME/NUMBER	SUPERVISOR	DATE	PAGE
CLEAR BY ARREST	DET. J. BENNER 1480P	SGT. REISLER 379P	7-Jun-01	2 OF 3

INVESTIGATIONS

COLORADO SPRINGS POLICE DEPARTMENT
CONTINUATION/SUPPLEMENTAL REPORT

CASE REPORT NUMBER: 01-19192

CHARGE	STATUTE NUMBER	UCR RECLASSIFICATION TO	UCR CODE
POSSESSION OF WEAPONS BY PREVIOUS OFFENDERS	18-12-108		

VICTIM'S NAME (LAST, FIRST MIDDLE)	DATE OF THIS REPORT
STATE OF COLORADO	06-07-01

ARRESTEE NAME (LAST, FIRST MIDDLE)	RES ADD: / CITY & STATE:	RACE	SEX	AGE	DOB

ARRESTEE NAME (LAST, FIRST MIDDLE)	RES ADD: / CITY & STATE:	RACE	SEX	AGE	DOB

DETECTIVE STATEMENT CONT'D:

immediately started to read Patane his Miranda Warning, at which time Patane waived his rights stating, "I now my rights." I asked him if he wanted to talk to me about a firearm he may have in his possession. He tated, "The .357 is in police custody already." I told him I was more interested in the Glock handgun he was in is possession that he had bought at a gun show. He told me he wasn't sure if he should show me where the un was because he didn't want it taken from him. I explained to Patane he was being cooperative to this point, nd to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm. t that point he stated, "The Glock .40 caliber pistol is in my bedroom on the wooden shelf against the wall in a ray case.

asked him if he would give me verbal permission to go inside his bedroom (which was the southeast bedroom the house) to retrieve the pistol and he said, "yes". I obtained the pistol from the second shelf from the top of s wooden bookshelf behind some magazines. It was inside a gray gun case. The gun was a Glock .40 caliber ', model 22, serial #RE377. A magazine was inside the pistol with ten (10) .40 caliber rounds inside the agazine. There was a clear plastic bag with thirty-one (31) .40 caliber loose bullets contained inside that was und also inside the gun case.

fter recovering the firearm through verbal consent, I asked him where he had bought the gun. He stated he ought the above stated gun at a gun show but couldn't remember exactly how much he paid for the gun. He ated he had shot it a few time but not many. I asked him if Ms. O'Donnell had shot the gun and he stated, he did not". I asked if he had used the gun in the commission of any crimes and he stated "no". I then dvised Patane I would still be investigating this matter but he was not being arrested for the possession of the earm at this time.

fficer Fox then transported Patane down to CJC for the violation of a temporary restraining order. The Glock 0 caliber pistol, the magazine, the bullets and the case were placed into evidence.

n June 07. 2001, ATF RAC Marianos and I met with El Paso County Probation Officer Janine Sunyay, whom is sponsible for the supervision of Patane. During this meeting Sunyay identified a picture of Patane under aster Names Index #000286225. Sunyay stated and provided a Probation Department document in the name Samuel Patane. It stated Patane was under probation for case number 97M5969, and was under deferred dgment for a felony under case number 98CR64-5.

n that same date I received certified copies of conviction for Samuel Patane, DOB: 11-13-49 for criminal case mbers 97M5969, third degree assault, and for 98CR64-5, possession of a controlled substance.

information was referred to ATF RAC Marianos for pending federal charges and further investigation.

further

000097

(109)

DISPOSITION	OFFICER NAME/NUMBER	SUPERVISOR	DATE	PAGE 3 OF 3
LEAD BY ARREST	DET. J. BENNER 1450P	SGT. REISLER 379P	7-Jun-01	

INVESTIGATIONS

STATE OF WISCONSIN, CIRCUIT COURT, **VILAS COUNTY**

☑ State of Wisconsin

vs.

LINDA S. O'DONNELL
Defendant

07/07/1957
Date of Birth

Bail/Bond
☑ Cash Bail ☐ Signature Bond
☐ Surety bond ☐ Property Bond

Case No. 01CM

Concealed Weapon; Crim. Trespass; Misd. theft; Crim. Damage

A. Monetary Conditions of Release

1. ☒ Defendant shall deposit cash bail of $ 1000.00. Date deposited 04/11/01.
Any fines, forfeitures or costs imposed against the defendant shall be paid out of the cash bail without further notice.
2. ☐ Defendant: and/or ☐ Surety:
Guarantees compliance with the terms of this bond by pledging $_____
and understands that if the defendant does not comply with the terms of this bond, the bond will be forfeited and the defendant and/or surety may be ordered to pay the amount of the bond. Approved surety name(s): _____
3. ☐ Defendant: and/or ☐ Surety:
Guarantees compliance with the terms of this bond by pledging $_____ in personal or real property (**description attached**) and understands that if the defendant does not comply with the terms of this bond, the bond will be forfeited and the defendant and/or surety may be required to surrender the property. Approved surety name(s): _____

B. Additional Conditions of Release

- Defendant shall appear on all court dates.
- Defendant shall give written notice to the Clerk of this Court within 48 hours of any change of address or telephone number.
- Defendant shall not commit any crime.
- Defendant shall neither directly nor indirectly threaten, harass, intimidate or otherwise interfere with victims or witnesses in this action.

Other: No contact w/ Jesse Wagner nor Jean Byszek
No possession of weapon

☐ See Attached.

This bond is in effect until disposition or until modified by the court.

The sheriff shall detain the defendant in custody until the defendant has signed the bond, complied with the monetary conditions of release, or is otherwise discharged.

I have received a copy of this bond and I agree to its terms. I understand that my next court date is:

Circuit Court Location	Date	Time
Vilas Co. Circuit Court, 330 Court St., Eagle River, WI 54521	6/6/01	9:00AM

Defendant's Signature	Date	Defendant's Address	Telephone Number
Linda S. O'Donnell	4/11/01	852 Calvert Ave Colo Spgs 80904	719 338-85
Surety's Signature	**Date**	**Surety's Address**	**Telephone Number**
Frank [illegible]	4-11-01	COLO SPRINGS PO BOX 7094	719 331-4705

☒ I have furnished the defendant with a copy of this document.

[illegible]
Signature

Correctional Officer C027
Title

4-11-01
Date

DEFENDANT'S EXHIBIT
D
01-CR-228-WM
witness

CR-223, 4/00 Bail/Bond

§§66.114, 345.32, 940.49, ch. 969, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

State of Wisconsin **Circuit Court** **Vilas County**

STATE OF WISCONSIN

Plaintiff,

-VS-

DA Case No.: 2001VI000268
Assigned DA/ADA: Albert D Moustakis
Agency Case No.: 01-002907

Court Case No.: 01-CM- 129
ATN:

Linda S O'Donnell
822 Calvert Avenue
Colorado Springs, CO 80904
DOB: 07/07/1957

Defendant,

Criminal Complaint

Complainant, on information and belief, being first duly sworn, upon oath, states that the above named defendant, in the County of Vilas, State of Wisconsin:

Count 1: CARRYING A CONCEALED WEAPON

The above-named defendant on or about Saturday, April 07, 2001, in the Town of Manitowish Waters, Vilas County, Wisconsin, not being a peace officer, did go armed with a concealed and dangerous weapon, to wit: a .38 handgun, contrary to sec. 941.23, 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 2: CRIMINAL TRESPASS

The above-named defendant on or about Saturday, April 07, 2001, in the Town of Manitowish Waters, Vilas County, Wisconsin, did intentionally enter the dwelling of Jeannine M. Byczek, without the consent of some person lawfully upon the premises, under circumstances tending to provoke a breach of the peace, contrary to sec. 943.14, 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 3: MISDEMEANOR THEFT

The above-named defendant on or about Saturday, April 07, 2001, in the Town of Manitowish Waters, Vilas County, Wisconsin, did intentionally take and carry away the movable property of Jeannine M Byczek and Jerry E. Wagner, without consent and with intent to permanently deprive the owner of possession of the property, contrary to sec. 943.20(1)(a) and (3)(a), 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 4: CRIMINAL DAMAGE

The above-named defendant on or about Saturday, April 07, 2001, in the Town of Manitowish Waters, Vilas County, Wisconsin, did unlawfully, intentionally cause damage to the physical property of Jerry Wagner, without consent, contrary to Sec. 943.01(1), Wis.Stats. Upon conviction of this charge, a Class A misdemeanor, the maximum penalty is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. Sec. 939.51(3)(a), Wis.Stats.

And prays that said defendant be dealt with according to law; and that the basis for the complainant's charge of such offenses is:

PROBABLE CAUSE:

Complainant relies on the official officer's reports of Deputy Mark A. Collins and Deputy Petreikis responded to assist Lt. Varebrook and Deputy Duwe, all of the Vilas County Sheriff's Department. The authors are sworn members of law enforcement. I have worked with the officers before and found them to be truthful and reliable. I believe the reports were generated in the scope of their employment and in the ordinary course of business of law enforcement. I believe the reports are truthful and reliable as records kept in the ordinary course of business. I have used reports of this kind and found them to be truthful and reliable in the past.

On April 7, 2001, Deputy Collins and Deputy Petreikis responded to assist Lt. Varebrook and Deputy Duwe, all of the Vilas County Sheriff's Department to a disturbance call at 27 Townline Road in Manitowish Waters, Wisconsin. This occurrence was at the residence of Jeannine Byczek and Gerald Wagner.

Mr. Wagner and Ms. Byczek returned to their home of 27 Townline Road between 7:30 – 8:00 p.m. that evening to discover that a 1988 Buick Century station wagon titled in Ms. Byczek's station wagon was being driven by Linda O'Donnell. Ms. Byczek stopped in the middle of the driveway to block Ms. O'Donnell's driving out of the yard. While attempting to leave with the station wagon, O'Donnell hit another car. A verbal and physical confrontation ensued involving O'Donnell, Wagner and Byczek. After officer's arrived at the scene, Linda S. O'Donnell exited a silver-colored Plymouth she arrived to the residence in and immediately began to argue with Ms. Byczek. The deputy's decided to separate the parties. Later, deputies performed a consensual search of the vehicle used by O'Donnell. Lt. Varebrook found a loaded 38-caliber Special Revolver handgun, with silver in color and a black handle underneath the driver's seat. This gun was not cased. It was later identified at the Vilas County Sheriff's Department that this gun belonged to Linda S. O'Donnell.

As Ms. Byczek and Mr. Wagner entered into the house they discovered that there was forced entry into the house at the rear upper entrance near the dining room and kitchen. The door to the house was closed and secured with a chain lock. There were pry marks on the wooden frame and door assembly near the bolt and strike plate area. They were

instructed to prepare a list of items stolen and/or missing. (See attached sheet containing information that Officer Duwe received from Ms. Byczek and Mr. Wagner indicating the items that were stolen and/or missing from the residence.

When interviewed, O'Donnell admitted to entering the house and taking property out of the home. Wagner indicated that many of the items taken were taken from his bedroom and did not belong to his son. Wagner indicated that he did not give anyone permission to enter his home or take any items from that home or damage and of his property. Jarread Wagner, the son of Jerry Wagner indicated to Helga Low of the Vilas County Social services department that his mother, Linda O'Donnell forcibly entered the Wagner residence.

I believe the statements of Jarread Wagner, an ordinary citizen, as contained in the officer's report, are truthful and reliable as a first-hand recollection of the acts complained of.

I believe the statements of Jerry Wagner, an ordinary citizen, as contained in the officer's report, are truthful and reliable as a victim of the crime complained of.

I believe some statements of Linda S O'Donnell are truthful and reliable since she made them voluntarily to law enforcement and they constitute admissions against her penal interest.

Copies of all other pertinent documents are attached to this complaint and incorporated herein as if fully set forth.

Based on the foregoing, the complainant believes this complaint to be true and correct.

Subscribed and sworn to before me,
and approved for filing on:

April 10, 2001

Complainant

Albert D Moustakis
District Attorney
State Bar No. 1018354

ITEMS REPORTED AS STOLEN AND/OR MISSING

WISCONSIN MOTOR VEHICLE TITLES —

TAKEN FROM ICE CABINET N LIVING OOM

- 96 FORD EXPLORER (J. BYCZEK)
- 91 DODGE TRK (J. BYCZEK)
- 99 PONT GRAND AM (J. BYCZEK)
- 80 HARLEY DAVIDSON M/C (~~J. BYCZEK~~) (G. WAGNER)
- 79 HARLEY DAVIDSON M/C (G. WAGNER)
- 77 FORD VAN (G. WAGNER)
- 62 MG TD-4 (G. WAGNER)

TAKEN FROM ICE CABINET N LIVING M

BIRTH CERTIFICATES + SSAN CARDS

ADENA L. BYCZEK — JEANNINE M. BYCZEK

GERALD E. WAGNER — JARREAD W. WAGNER.

TAKEN FROM GARAGE —

① HARLEY DAVIDSON "FAT BOY" FENDER $65.00
GREEN PLASTIC.

① PLASTIC TOTE BOX w/ MISC. CONTENTS (UNKNOWN) $5.00

⑩ CARDBOARD BOXES w/ MISC ITEMS - MOSTLY ITEMS OF CLOTHING (~~JARREAD'S~~), ETC. FROM ~~JARREAD'S~~ ROOM.

89 DODGE PKP TRK (PARKED ON DRIVEWAY NEAR HOUSE)
RIGHT FRONT TIRE DEFLATED - MAY POSSIBLY HAVE BEEN PUNCTURED.
ASSORTED TOOLS FROM BOX MOUNTED IN PICKUP BED STILL IN ABOUT - UNKNOWN IF ANYTHING MISSING.

ITEMS TAKEN FROM JARREAD'S BEDROOM —

① 13" ORION COLOR TELEVISION, BLK PLASTIC CABINET / SER + MOD # UNKNOWN $100.00

① FIVE KNIFE COLLECTION — (MFG. UNK.) WOODEN DISPLAY CASE W/ CLEAR PLASTIC WINDOW. 5 - ASSORTED STRAIGHT (FIXED) BLADES $100.00

① THREE KNIFE COLLECTION — (MFG. UNK) WOODEN DISPLAY CASE W/ 3 POCKET-TYPE FOLDING KNIVES. $60.00
ONE KNIFE HAS EAGLE + ONE A WOLF SCENE ON HANDLE.

① 15" (APPROX.) STRAIGHT KNIFE ON A WOODEN PLAQUE DISPLAY. (MFG. UNK) KNIFE BLADE IS SPLIT, W/ BLACK COMPOSITE HANDLE. $75.00

KNIFE DISPLAYS WERE TAKEN OFF THE WALL WHERE THEY HAD BEEN DISPLAYED.

DAMAGE TO 2ND LEVEL ENTRANCE DOOR TO RESIDENCE, NORTH SIDE OF BLDG. PRYING CAUSED SOME SPLINTERING TO DOOR + WOODEN TRIM / FRAME. CHECK CHAIN ALSO DAMAGED.
EST REPAIR @ APPROX $50.00

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